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PREVENTIVE LAW: TAILORING THE CORPORATE FORM OF BUSINESS TO ENSURE FAIR TREATMENT OF ALL

*F. Hodge O'Neal**

Many lawyers organize corporations with a standard set of articles of incorporation and bylaws.[1] The procedure is simple: the lawyer asks his secretary to find the articles and bylaws of a corporation he previously organized; he changes the corporate name and makes a few other minor variations in the formal details; he files the slightly modified articles in the office of the Secretary of State, and the corporation comes into existence. Unfortunately, the use of this simple procedure can have highly undesirable consequences.

The dull sameness in standard articles and bylaws must be contrasted with the uniqueness of each business situation. The needs, desires, skill, and tax brackets of the participants vary significantly from one business to another. If standard articles and bylaws only are used, the final product may not reflect important parts of the business bargain. Moreover, vague understandings and assumptions the participants may have concerning the operation of the business and their respective roles are not formally resolved and reduced to writing.

To tailor a corporation to the individual needs of a particular business and its participants, a lawyer must be able to plan and draft preincorporation agreements, special charter and bylaw provisions, stock transfer restrictions, buy-and-sell arrangements, stockholders' pooling agreements, long-term employment contracts, and various other instruments. These instruments should accurately reflect, and operate to con-

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[1] Modest-size communities are presumably populated by a plethora of store-front enterprises whose corporate existence consists primarily of standard-form articles of incorporation and bylaws furnished as a matter of course by local counsel. To the extent that charter and bylaw provisions are the product of boiler-plate rather than collaborative effort by the business "partners" and their attorney to fit each clause to the enterprise's particular needs, the corporate documents reflect a minimum of sophisticated legal planning.
Note, *Mandatory Arbitration as a Remedy for Intra-Close Corporate Disputes,* 56 VA. L. REV. 271, 275 (1970).

form the business to, the participants' expectations. A lawyer—whether in a large or small firm—does not adequately serve his business clients unless he considers the use of instruments of this kind.[2]

The planning and drafting of instruments for a close corporation[3] require the lawyer to analyze difficult factual problems and to use effectively a great variety of materials, legal and nonlegal, tax and nontax, common law and statutory. Almost any legitimate desire of a client can be achieved if the lawyer is sufficiently resourceful. The lawyer organizing a new corporation should be creative in searching for solutions to his clients' problems, yet he must give cautious attention to the composite experiences and wisdom of practitioners and scholars. Furthermore, any arrangement a lawyer creates for a business client must not only be legal; it must be "workable," and it must make sense from a business perspective. Practitioners soon realize that a fine line cannot be drawn between theory and practice. The lawyer must study the trends in legal developments because the law is constantly evolving. Indeed, for the lawyer preparing legal documents, yesterday's impossibilities may well offer today's opportunities.

The lawyer organizing a corporation must carefully weigh the advantages and disadvantages of alternative courses of action to achieve a desired result. He must always consider the tax consequences. He may use "forms," or specimen documents, as idea guides, check lists, and language tools. A form, however, should never be used as a substitute for analysis of a client's problem, and a clause should never be lifted from a form and used if its meaning and purpose are not fully understood.

This Article seeks to assist the lawyer incorporating a business with the techniques of preventive law.[4] In discussing various devices to tailor a corporation to meet the goals of business participants, and the laws that help or hinder the attainment of these goals, this Article illustrates the need for lawyers to devote more time and energy to the practice of preventive law.

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[2] *See generally A Businessman's View of Lawyers,* 33 BUS. LAW. 817 (1978).

[3] Characteristics of a "close corporation" include: "(1) lack of public ownership, (2) control vested in a small number of stockholders, (3) stockholders and operating executives, to a large extent, composed of the same people, and (4) restricted ownership in that there is no ready market for the stock." T. NESS & E. VOGEL, TAXATION OF THE CLOSELY HELD CORPORATION § 1.1, at 5 (rev. ed. 1972), *quoted in* Comment, *Stock-Purchase Transactions Upon the Death of a Shareholder of a Closely Held Corporation,* 45 MISS. L.J. 1191, 1191 n.1 (1974).

[4] "[I]t is easier for the draftsman to write the rules of a particular situation in advance than it is for a court to divine them later, perhaps in wholly unanticipated consequences." ABA-ALI MODEL BUSINESS CORPORATION ACT § 26A(d), comment (1953).

I. Techniques to Balance Corporate Control

A. *Special Charter and Bylaw Provisions*

An initial step in tailoring the control pattern of a corporation is drafting stock clauses and optional clauses for the articles of incorporation. Several variations in stock clauses can be used. A corporation's stock may be classified into several classes, with each class having different voting powers,[5] or each class having the authority to elect a specified number of directors.[6] The total voting power of a shareholder may be limited, or multiple votes may be accorded a single share.[7] Another alternative is to provide some shares with voting power, but no proprietary rights.[8]

Variations in the optional clauses can also affect the corporate control pattern. Most states statutorily provide that certain items, designated as "mandatory clauses," be included in the corporation's articles,[9] but also permit the inclusion of additional optional clauses.[10] Section 79-3-105 of the Mississippi Code, for example, provides in part:

> The articles of incorporation shall set forth
>
> . . . .
>
> (h) Any provision granting to shareholders the preemptive right to acquire additional or treasury shares of the corporation.
>
> (i) Any provision, not inconsistent with law, which the incorporators elect to set forth . . . for the regulation of the internal affairs of the corporation, including any provision restricting the transfer of shares and any provision which under this chapter is required or permitted to be set forth in the bylaws.[11]

---

[5] *See, e.g.*, Miss. Code Ann. § 79-3-27 (1972) (authorizing different classes of stock with different voting powers). The issuance of different classes of stock was first authorized in Mississippi in 1928. Act of April 13, 1928, 1928 Miss. Laws ch. 90, § 2 (codified at Miss. Code Ann. §§ 79-3-27 to -41 (1972)); *see* Roberds, *The New Corporation Act*, 2 Miss. L.J. 179, 179 (1929).

[6] *See* Miss. Code Ann. § 79-3-27 (1972) (relative rights of classes of stock may be varied).

[7] *See id.* (special voting rights may be accorded a class of stock "to the extent not inconsistent with the provisions of this chapter").

[8] *See, e.g.*, Lehrman v. Cohen, 43 Del. Ch. 222, 222 A.2d 800, 805-07 (Sup. Ct. 1966) (validated single share of a new class of stock with no dividend and only par value liquidation rights, created solely to give power to elect the deadlock-breaking director); Stroh v. Blackhawk Holding Corp., 117 Ill. App. 2d 301, 253 N.E.2d 692, 695-96 (1969) (upheld shares with voting rights but no proprietary or dividend rights).

[9] *See, e.g.*, Miss. Code Ann. § 79-3-105 (1972) (mandatory clauses include the corporate name, duration, organizational purposes, and designation of classes of stock).

[10] *See id. See generally* O'Neal, *Close Corporation Legislation: A Survey and an Evaluation*, 1972 Duke L.J. 867.

[11] Miss. Code Ann. § 79-3-105 (1972).

The draftsman may find it desirable to include as an optional clause a provision strengthening shareholders' rights to inspect books and records.[12] Optional clauses controlling dividend policy,[13] defining preemptive rights,[14] establishing procedures to deal with corporate deadlocks,[15] and restricting or abolishing the traditional powers of the board of directors[16] should also be considered. Special provisions in a

[12] A shareholder's right to inspect corporate books and records was well-established at common law. Guthrie v. Harkness, 199 U.S. 148, 155 (1905). Moreover, all states have created statutory inspection rights for shareholders. *See* ALA. CODE tit. 10, § 10-2-6 (1975); ALASKA STAT. § 10.05. 240 (1968); ARIZ. REV. STAT. § 10-175 (1956); ARK. STAT. ANN. § 64-312 (1947); CAL. CORP. CODE § 1601 (West 1977); COLO. REV. STAT. § 7-5-117 (1973); CONN. GEN. STAT. ANN. § 33-334 (West 1958); DEL. CODE tit. 8, § 220 (1974); D.C. CODE § 29-920 (1973); FLA. STAT. ANN. § 608-39 (West 1963); GA. CODE ANN. § 22-613 (1977); HAW. REV. STAT. § 416-95 (1976); IDAHO CODE § 30-144 (1949); ILL. ANN. STAT. ch. 32, § 157.45 (Smith-Hurd 1954); IND. CODE ANN. § 23-1-2-14 (Burns 1974); IOWA CODE ANN. § 491.47 (West Supp. 1978); KAN. STAT. § 17-6510 (Supp. 1977); KY. REV. STAT. § 271 A.260 (1977); LA. REV. STAT. ANN. § 12:103 (West 1969); ME. REV. STAT. tit. 13A, § 626 (1974); MD. CORP. & ASS'NS CODE ANN. §§ 2-512, -513, 4-403 (1975); MASS. GEN. LAWS. ANN. ch. 155, § 22 (West 1970); MICH. COMP. LAWS ANN. § 450.45 (1969); MINN. STAT. ANN. §§ 300.32, 301.34 (West 1969); MISS. CODE ANN. § 79-3-99 (1972); MO. ANN. STAT. § 351.215 (Vernon 1966); MONT. REV. CODE ANN. § 15-2246 (1947); NEB. REV. STAT. § 21-2050 (1943); NEV. REV. STAT. §§ 78.105, .257 (1977); N.H. REV. STAT. ANN. § 294:92 (1977); N.J. STAT. ANN. § 14A:5-28 (West Supp. 1978); N.M. STAT. ANN. § 51-24-48 (Supp. I 1975); N.Y. [BUS. CORP.] LAW § 624 (McKinney 1963); N.C. GEN. STAT. § 55-38 (1975); N.D. CENT. CODE § 10-19-51 (1976); OHIO REV. CODE ANN. § 1702.15 (Page 1964); OKLA. STAT. ANN. tit. 18, § 1.71 (West 1966); OR. REV. STAT. § 57.246 (1977); PA. STAT. ANN. tit. 15, § 1308 (Purdon Supp. 1977); R.I. GEN. LAWS § 7-1.1-46 (1970); S.C. CODE § 33-11-260 (1977); S.D. COMPILED LAWS ANN. § 47-4-25 (1967); TENN. CODE ANN. § 48-717 (Supp. 1977); TEX. BUS. CORP. ACT ANN. art. 2.44 (Vernon Supp. 1978); UTAH CODE ANN. § 16-10-47 (1953); VT. STAT. ANN. tit. 11, § 1896 (1973); VA. CODE § 13.1-47 (1950); WASH. REV. CODE ANN. § 23A.08.500 (1969); W. VA. CODE § 31-1-105 (1975); WIS. STAT. ANN. § 180.43 (West Supp. 1978); WYO. STAT. § 17-1-144 (1977). *See generally* Note, *Shareholders' Inspection Rights*, 30 OKLA L. REV. 616, 617 (1977). However, neither the common law nor the statutory right is absolute and may often be insufficient to meet the needs of a shareholder in a close corporation. A clause requiring periodic officer reports on designated matters should also be considered by the draftsman.

[13] As a control device, the charter may limit the discretion of the board of directors over dividend policy by providing that dividends may be declared only in specified circumstances, or by limiting the amount payable, or by making the declaration of dividends mandatory in certain instances. To avoid objections to a mandatory dividend provision, the draftsman may consider a clause deferring payment of salaries until a specified amount of dividends has been received by the shareholders.

[14] "Preemptive rights" give shareholders the privilege of purchasing new issues of stock in proportion to their holdings, before the stock is offered to outsiders.

[15] See notes 91 through 101 and accompanying text *infra*.

[16] A corporation's directors are cloaked with broad powers to run the corporation and establish policies necessary to the corporation's function. The directorial powers may be limited by legislative action, bylaws, articles of incorporation, or common law precedent. *See generally* N. LATTIN, THE LAW OF CORPORATIONS §§ 93-101 (2d ed. 1971).

corporation's bylaws,[17] in addition to, or rather than, optional charter clauses, may be an expedient tool for establishing a desired corporate control pattern.[18]

1. Setting Up Veto Arrangements

Businessmen forming a close corporation frequently consider themselves partners; they incorporate only to obtain limited liability or other corporate advantages.[19] Those who have a minority interest in the business often seek protection against the broad powers normally vested in majority shareholders and directors.[20] In short, they want the power to veto some or all corporate policies and decisions.

Participants in a closely held enterprise usually expect to become directors and to occupy executive positions. Consequently, they may be especially interested in the power to prevent removal of directors and officers, modification of their duties, changes in their salaries, or changes in the ratio between salaries. At the least, a shareholder normally wants to be able to prevent his own discharge from corporate employment or a reduction in his salary.[21] On the other hand, a shareholder who has provided the lion's share of the money for an enterprise may want a veto over salary increases, dividend payments, purchase and retirement of the stock, creation of indebtedness, and perhaps the issuance of preferred stock.

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[17] Bylaws function to prescribe the rights and duties of the members regarding the internal management of the corporation. *See* Bank of Holly Springs v. Pinson, 58 Miss. 421, 436 (1880) (third parties dealing with corporate officers or agents are not bound by restrictions or limitations placed in bylaws). Almost any provision that has a legitimate need and that does not conflict with the charter or statutory requirements can be included in the bylaws. *See, e.g.*, MISS. CODE ANN. § 79-3-51 (1972) ("The bylaws may contain any provisions for the regulation and management of the affairs of the corporation not inconsistent with law or the articles of incorporation.").

[18] Provisions in the bylaws may be tailored to the skills and personalities of the participants. Thus, specimen bylaws are generally of little assistance to the attorney organizing a close corporation.

[19] Among the corporate advantages are taxation, pension plans, medical and dental plans, life insurance policies, and distribution of ownership among family members. *See generally* H. HEEN, HANDBOOK OF THE LAW OF CORPORATIONS § 259, at 509 (2d ed. 1970).

[20] [O]rdinarily the board is elected by a plurality of the votes of the voting shares, and the officers are elected by the board.

> The hiring, firing, and compensation of officers and employees is normally a board function, as is the declaration of dividends, the purchase and leasing of property, and the borrowing of money.

Viessler & Hancock, *Planning a Corporate Power-Financial Structure*, 24 PRAC. LAW. 13, 22 (1978).

[21] For discussions of oppressive devices used by directors and majority shareholders against minority shareholders, see F. O'NEAL, OPPRESSION OF MINORITY SHAREHOLDERS (1975); Note, *Freezing Out Minority Shareholders*, 74 HARV. L. REV. 1630 (1961).

The difficulty of disposing of holdings in a close corporation augments minority shareholders' desire for a veto over corporate decisions. Restrictions are often placed on the transferability of shares in a closely held corporation.[22] Even in the absence of such restrictions, minority shareholders are inhibited from withdrawing their funds from the venture when they become dissatisfied with its operation, since there is no ready market for the shares.[23]

Business considerations prompting the "veto desire" are not usually reflected in the instruments lawyers prepare for closely held enterprises. Part of the explanation for this failure lies in outmoded laws in some states that hinder or complicate the establishment of veto arrangements,[24] and part lies in the lawyer's inability to break away from traditional thinking on corporate management patterns.[25] Furthermore,

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[22] *See* Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 512 & n.13 (Mass. 1975) (a typical rationale for restrictions is to block acquisition by persons unacceptable to the other shareholders). *See generally* Cataldo, *Stock Transfer Restrictions and the Closed Corporation*, 37 VA. L. REV. 229 (1951); O'Neal, *Restrictions on Transfer of Stock in Closely Held Corporations: Planning and Drafting*, 65 HARV. L. REV. 773 (1952).

[23] The severity of the financial problems facing a dissatisfied minority shareholder is apparent when one considers that the typical minority shareholder has a substantial percentage of his personal assets invested in the corporation. *See* Galler v. Galler, 32 Ill. 2d 16, 27, 203 N.E.2d 577, 583-84 (1965) (disgruntled shareholder relied on shareholder agreement to protect her investment). *See generally* Note, *A Plea for Separate Statutory Treatment of the Close Corporation*, 33 N.Y.U.L. REV. 700, 718 (1958).

[24] *See generally* O'Neal, *Close Corporations: Existing Regulations and Recommended Reform*, 33 BUS. LAW. 873 (1978).

The laws are considered "outmoded" in the sense that they reflect the needs and concerns of "big business," while overlooking the flexibility needed in the management of a close corporation:

> [M]ost of the statutory and regulatory framework governing American businesses seems to be aimed primarily at the big businesses [which], although they dominate the marketplace in terms of total receipts, represent a very small proportion of the total number of operating private businesses. There is a significant chance that this big business bias can produce inequitable results when applied to small, closely held companies.

Haynesworth, *The Need for a Unified Small Business Legal Structure*, 33 BUS. LAW. 849, 851-52 (1978). *See also* Conrad, *The Corporate Census: A Preliminary Exploration*, 63 CALIF. L. REV. 440, 453 (1975) (calling for legislation tailored to the needs of small businesses).

Exemplary of the potential big business bias is the Mississippi Business Corporation Act, which applies equally to large and small corporations. *See* MISS. CODE ANN. § 79-3-287 (1972); McLendon, *Formation, Operation and Dissolution of Business Corporations*, 34 MISS L.J. 281, 291 (1963).

[25] For an example of "traditional thinking," see Comment, *The Power of an Equity Court in Mississippi to Dissolve a Corporation*, 15 MISS. L.J. 150, 150-51 (1943) ("The minority stockholders of a corporation have assented to majority rule and are bound by that rule when it is properly and impartially exercised."). The idea that shareholders are at the mercy of the directors in management matters is reflected in Snyder, *Criminal Breach of Trust and Corporate Mismanagement*, 11 MISS. L.J. 123, 141 (1938).

many lawyers have failed to capitalize on the flexibility permitted by recent statutes. These lawyers apparently oppose "tampering in any way" with the customary power of shareholders and directors to rule by majority vote.[26]

Several devices[27] may be employed to provide a veto to minority shareholders. The most easily accomplished and most effective devices are charter or bylaw provisions that require a high percentage of voting units for shareholders or director action, or a high attendance requirement for quorums at meetings of shareholders and directors. These two devices are discussed in detail below.

a. Veto Over Fundamental Corporate Action

The power to veto fundamental changes in the corporate structure can be easily effectuated. Corporation statutes[28] require shareholder approval of fundamental acts, such as amendment of the articles of incorporation, merger, consolidation, voluntary dissolution, and sale of all assets. Moreover, such statutes, including the Mississippi Business Corporation Act,[29] typically authorize high vote requirements for shareholder action.

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[26] Courts likewise adhere to the traditional majority rule:

> Corporations must be allowed to function under majority control, as do most institutions in this country, so long as the majority does no actual wrong to the minority or to others. Courts are not to be called on to operate or control them except in cases wherein such interference is essential to justice; and in interfering with what the majority has done . . . real caution must be taken . . . .

Landstreet v. Meyer, 201 Miss. 826, 835, 29 So. 2d 653, 656 (1947), *quoted in* Hudson v. Belzoni Equip. Co., 211 Miss. 178, 188, 51 So. 2d 223, 226 (1951).

[27] Among the devices and arrangements that can be serviceable in establishing a veto are the following: (1) classification of the corporation's shares into voting and nonvoting shares, with voting shares distributed equally between two shareholders or two factions of shareholders to give a balance of voting power, and thus a veto to each shareholder or faction of shareholders, (2) classification of the corporation's shares into a number of classes of voting stock, inclusion in the articles of a provision requiring a vote by classes of stock for shareholder action of the kind over which a veto is desired, and issuance of all of the shares or a majority of the shares of a separate class of stock to each shareholder, (3) class voting for directors, with each of several classes of shares electing a specified number of directors, and (4) voting agreements among shareholders.

[28] *E.g.*, DEL. CODE tit. 8, §§ 351, 354-355 (1974); MD. ANN. CODE art. 23, § 104 (1973).

[29] MISS. CODE ANN. § 79-3-61 (1972) provides:

> Unless otherwise provided in the articles of incorporation, a majority of the shares entitled to vote, represented in person or by proxy, shall constitute a quorum at a meeting of shareholders, but in no event shall a quorum consist of less than one-third (1/3) of the shares entitled to vote at the meeting. If a quorum is present, the affirmative vote of the majority of the shares represented at the meeting and entitled to vote on the subject matter shall be the act of the shareholders, unless the vote of a greater number or voting by classes is required

A provision in a corporation's articles requiring unanimity for shareholder action will give an effective veto over fundamental corporate acts. Similarly, a provision requiring approval of the holders of a high percentage of the shares for shareholder action can provide a veto over fundamental acts. For instance, a provision requiring approval by holders of seventy-five percent of the shares obviously empowers a holder of thirty percent of the shares to prevent shareholder action. The draftsman must be careful, however, to guard against circumvention of these veto devices. Specifically, a unanimity requirement may be deleted by amendment of the articles unless it is protected against amendment, and a high-vote requirement may be circumvented through the issuance of additional shares.

b. Veto Over Director Action

High voting requirements for shareholder action do not ordinarily extend a shareholder's veto power to important matters such as selecting officers, changing officers' salaries, making basic policy decisions, or declaring dividends. These types of decisions normally fall within the province of the board of directors.[30] To provide a veto to a minority shareholder, unanimity or a high vote must be required for director action and the minority shareholder must be assured representation on the corporation's board of directors.

Following the corporation statutes of most states, the Mississippi Business Corporation Act contains a section clearly authorizing high voting requirements for director action. Section 79-3-77 of the Mississippi Code provides:

> A majority of the number of directors fixed by the bylaws, or in the absence of a bylaw fixing the number of directors, then of the number stated in the articles of incorporation, shall constitute a quorum for the transaction of business unless a greater number is required by the articles of incorporation or the bylaws. The act of the majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors, unless the act of a greater number is required by the articles of incorporation or the bylaws.[31]

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by this chapter or the articles of incorporation or bylaws.

Id. § 79-3-279 (1972) provides:

> Whenever, with respect to any action to be taken by the shareholders of a corporation, the articles of incorporation require the vote or concurrence of the holders of a greater proportion of the shares, or of any class or series thereof, than required by this chapter with respect to such action, the provisions of the articles of incorporation shall control.

[30] See note 20 *supra*.

[31] MISS. CODE ANN. § 79-3-77 (1972).

A minority shareholder can usually be guaranteed board representation by executing a shareholders' agreement permitting him to designate a director or by inaugurating cumulative voting.[32] Alternatively, the corporation's shares may be classified, with a separate class of shares being distributed to each shareholder and with a provision that a director or a specified number of directors be elected by each class of shares.[33]

Further protection of the minority shareholder can be provided by a prohibition in the charter or bylaws against board action while the shareholder's position on the board is vacant because of death or resignation of his representative. A cautious draftsman will also provide that the vacancy cannot be filled by other shareholders or their representatives on the board.

c. *Veto over Officer Action*

Corporate officers may sometimes perform, without director approval, acts over which a minority shareholder desires a veto. Thus, it may be necessary to delineate specifically and define narrowly each officer's authority and duties in the charter or bylaws. To protect the corporation from harm caused by corporate officers acting outside the scope of their authority, the officers can be bonded. This arrangement provides derivative protection for the stockholders, as well as direct

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[32] Under a system of cumulative voting, the number of shares held by a shareholder is multiplied by the number of directors to be elected, and the shareholder may cast for a single candidate the total number of votes arrived at by this process of multiplication, or he may distribute the total among several candidates. Thus, under this system, if a minority shareholder owns 17 shares in a corporation with a total of 100 shares, he can always elect at least one director on a five-man board since he is entitled to 85 (17 x 5) votes. The following algebraic formula can be used to determine how many votes are required to elect a specified number of directors.

(1) A represents the number of directors the shareholder desires to elect.
(2) B represents the number of shares present and voting.
(3) C represents the total number of vacancies to be filled.
(4) X represents the number of shares necessary to achieve the desired result.

$$X = \frac{AB + 1}{C + 1}$$

While cumulative voting "is not likely to seriously diminish the power of corporate management . . . in some cases at least it might result in a watchdog or heretical voice on the board of directors." Schwartz, *Symposium, Federal Chartering of Corporations: An Introduction*, 61 GEO. L.J. 71, 82 (1972).

[33] A high vote requirement for director action, enacted to protect minority shareholders, may also result in strengthening officer power. Kessler & Hancock, *supra* note 20, at 24. "If an officer who is also a director is given broad powers and there is a high vote requirement for director action on the matter, his power as an officer can be virtually unfettered through his ability to veto any attempted reversal of his action." *Id.*

protection for the corporation.

A preventive approach, which is widely used to provide a veto over important actions such as disbursing funds and borrowing money, is to require the signatures of two or more officers, each representing a shareholder or faction of shareholders, for the execution of checks, promissory notes, and other instruments.[34] A variation of this arrangement prohibits an officer from engaging in certain activities[35] without the concurrence of another officer, or the advance consent of the directors. Corporate assets can also be protected from officer misappropriation by such practical safety measures as using a storage lock that requires two keys to open and giving a key to two different officers.

2. Transferring Decision-Making from Directors to Shareholders

If a shareholder cannot be assured representation on the board of directors, or for any reason an effective veto over board action cannot be given, a veto over matters ordinarily within the province of the board can sometimes be provided by transferring the decision-making power over these matters from the directors to the shareholders, and then requiring unanimity or a high vote for shareholder action. In some states, under very recent statutes, all management powers in a close corporation can be vested in the shareholders by an appropriate charter provision.[36]

Since the Mississippi Business Corporation Act provides that "[t]he business and affairs of a corporation shall be managed by a board of directors,"[37] the blanket transfer of all corporate power to the shareholders would probably not be sustained.[38] Indeed, even the transfer of some director powers to the shareholders, such as the power to select corporate officers, would be of doubtful validity in Mississippi. Control statutorily granted to directors apparently cannot be trans-

[34] The shareholders should be cautioned that bylaws requiring such protective measures can be waived. *See, e.g.*, Havana Cent. R.R. v. Central Trust Co., 204 F. 546 (2d Cir.) (two-signature requirement for executing checks waived by acquiescence in noncompliance), *cert. denied*, 234 U.S. 755 (1914).

[35] For example, a provision can limit the officer's authority to engage in transactions involving a relatively small dollar amount, or can require the officer to act on certain matters within a designated time period.

[36] *E.g.*, DEL. CODE tit. 8, § 351 (1974); MD. ANN. CODE art. 23, § 104 (1973).

[37] MISS. CODE ANN. § 79-3-67 (1972).

[38] *Cf.* Woodbury v. McClurg, 78 Miss. 831, 836, 29 So. 514, 515 (1901) (upholding denial of corporate charter on the "principle of law that a corporation created under general laws takes its authority from such general laws, and not from the articles of association"). A state's exclusive control over the conditions of corporate organization and operation is well-established. *See* Voeller v. Neilston Warehouse Co., 311 U.S. 531, 535 (1941).

ferred to the shareholders or be made subject to shareholder ratification.[39]

Some state statutes, however, provide that the articles or bylaws can delegate certain corporate acts to the shareholders[40] or to the directors.[41] Thus, if the shareholders want a veto over the selection of corporate officers and the fixing of their salaries, a clause can be inserted in the charter providing that the shareholders shall elect the officers and fix their salaries, and that this action can be taken only by a unanimous or other specified vote.

3. High Quorum Requirement

A provision may be inserted in the articles or bylaws requiring the presence of a high percentage of shareholders or directors to constitute a quorum for transacting business.[42] To protect shareholders or directors from inadvertently appearing at a meeting to consider action they oppose, the high quorum provision should be buttressed by requiring notices of meetings to state what business is to be considered. Otherwise, a shareholder or director may permit action on a matter he opposes by attending a meeting and thus helping to form the necessary quorum.

Although many lawyers are apparently of the opinion that the use of both high quorum and high vote requirements sets up a double hurdle to objectionable corporate action, this double protection view is actually more illusory than real. First, courts may hold that directors are under a duty to attend meetings and are not free to refrain from attending in order to block certain actions.[43] Second, from a practical viewpoint, if a shareholder or director refrains from attending a meeting to prevent the formation of a quorum, he never gets an opportunity to veto a proposal by voting. Therefore, relying solely on a high vote requirement is in most situations preferred over the supposed double hurdle approach.[44]

4. Limitations and Disadvantages of Veto Arrangements

Although veto provisions are exceedingly useful tools in fashioning

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[39] *See, e.g.*, McQuade v. Stoneham, 263 N.Y. 323, 189 N.E. 234, 236-37 (1934) (invalidating shareholders' agreement to elect certain officers).

[40] *E.g.*, N.Y. [Bus. Corp.] Law § 715(b) (McKinney 1963).

[41] *E.g.*, Pa. Stat. Ann. tit. 15, § 1406 (Purdon Supp. 1978).

[42] The high quorum requirement may be imposed for the transaction of all business or for designated types of transactions—a selective veto power.

[43] *See, e.g.*, Gearing v. Kelly, 11 N.Y.2d 201, 203-04, 182 N.E.2d 391, 391-92, 227 N.Y.S.2d 897, 898 (1962) (per curiam) (election of replacement to board of directors upheld where quorum was not present since director deliberately remained absent).

[44] Another advantage of this approach is that it permits disgruntled shareholders or directors to get together, discuss their differences, and possibly discover areas of agreement or formulate policies satisfactory to all.

management patterns for close corporations, the limitations and disadvantages of veto provisions must not be overlooked. First, they give a veto and no more; they do not enable minority shareholders affirmatively to determine or execute corporate policy. Second, they deprive the corporation of flexibility to adjust to unexpected business situations. Third, and perhaps most important, even if all the shareholders can be expected to act in good faith, the presence of veto arrangements increases the chance that a deadlock will occur in the corporation's management, thus paralyzing the corporation and rendering it unable to conduct its affairs.[45] Finally, veto provisions may place an unscrupulous shareholder in a position to extort, as a condition of approval of beneficial corporate action, unfair concessions from the other shareholders. The use of veto provisions, therefore, involves balancing safeguards to protect the interests of minority shareholders with the freedom of action that is beneficial to the corporation and the shareholders as a group.

B. Utilizing A Shareholders' Agreement of Voting Trust to Tailor the Corporate Form

1. Shareholders' Agreements

A shareholders' agreement may be used to depart from traditional corporate management by allowing participants to agree among themselves on the allocation of control.[46] Management matters most often covered by shareholders' agreements include: (1) how the shares of the parties to the agreement are to be voted in elections of directors, (2) who are to be the officers of the corporation, (3) the salaries to be paid shareholder-employees, (4) the amount of time each participant is to devote to the business and whether he can engage in other activities, (5) the power of one or more of the participants to veto corporate decisions, (6) the circumstances in which dividends are declared, and (7) a method of resolving corporate disputes. The validity of a shareholders' agreement that attempts to determine some of these matters, such as the selection of officers and the fixing of their compensation, is open to question in many jurisdictions since it would usurp traditional decision-making powers of the directors.[47]

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[45] Some authorities, however, believe that the dangers of such deadlocks are overly stressed. *See, e.g.*, Dykstra, *Molding the Utah Corporations: Survey and Commentary*, 7 UTAH L. REV. 1, 9-10 (1960).

[46] The participants may enter into a "preincorporation agreement" or "promoters' contract" before incorporation, or they may wait until the corporation has been organized and then enter into a "shareholders' agreement." The contracting parties may be composed of a minority, majority, or all of the shareholders or prospective shareholders.

[47] In this connection, it should be recalled that the Mississippi Business Corporation Act provides that the affairs of a corporation shall be managed by a board of directors,

A shareholders' agreement may take a number of forms. It may be a simple joint voting contract, sometimes called a "pooling agreement," providing that the shareholders will vote their shares as a unit in elections of directors or in other matters. Under this arrangement, each shareholder retains title to his shares and the right to vote them. The shareholders merely agree to vote according to a prearranged plan. The agreement, however, may be more than a mere voting agreement; it may attempt to create irrevocable proxies that transfer the owners' voting power to other persons. Additionally, the agreement may establish a trust or a voting trust. The shareholders transfer the legal title to their shares to trustees, who vote the shares in accordance with the terms of the trust instrument. These various devices may be used to achieve the same or similar objectives, but conceptually and technically they are different. Although the courts do not always recognize the differences, the draftsman should.

Shareholders' agreements frequently run counter to the idea that businessmen who incorporate must consistently conduct their enterprise in the traditional corporate manner and cannot revert to partnership practices in management or in relations among themselves. This idea is perhaps most forcefully expressed in a leading New Jersey opinion, in which the court stated:

> The law never contemplated that persons engaged in business as partners may incorporate, with intent to obtain the advantages and immunities of a corporate form, and then, Proteus-like, become at will a copartnership or a corporation, as the exigencies or purposes of their joint enterprise may from time to time require . . . . They cannot be partners *inter sese* and a corporation as to the rest of the world.[18]

The idea that shareholders cannot conduct the corporation as though they were partners has been rejected by many courts, and its influence in decisions on the validity of shareholders' agreements seems to be decreasing steadily. Indeed, a number of states, but apparently not Mississippi, have expressly repudiated the idea by statute.[19]

Present attacks on shareholders' agreements often assert that the agreements violate a section of the corporation act, or that they are incompatible with the statutory scheme of corporate management and operation. The statute most frequently used in attacking shareholders' agreements is the widely prevalent statutory norm—that the corporate

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and that the Act does not expressly allow impingements on directors' managerial powers by provisions in the articles or bylaws or in a shareholders' agreement. See notes 38 & 39 and accompanying text *supra*.

[18] Jackson v. Hooper, 76 N.J. Eq. 592, 75 A. 568, 571 (1910).

[19] *E.g.*, S.C. CODE ANN. § 33-11-220(a) (1976); FLA. STAT. ANN. § 608.0105(2) (Supp. 1969).

business shall be managed by the board of directors.[50]

Decisions invalidating shareholders' agreements because of their inconsistency with statutory norms create grave problems for organizers of closely held businesses. Courts and legislatures should hasten to repudiate these decisions. Insisting on rigid compliance with the norms and strict adherence to the traditional management scheme may be proper in a public corporation since management is divorced from ownership, thus posing a serious threat to investors. Indeed, corporation statutes were designed largely to protect the shareholders and investors in public corporations, and, in all probability, the legislatures enacting those norms did not consider close corporations at all.[51] A shareholders' agreement in a close corporation is usually entered into by the parties only after careful deliberation and sometimes only after prolonged bargaining. Unlike investors in a publicly held corporation, who play no part in organizing the corporation and need the protection afforded by statutory norms, participants in a close corporation take an active and informed part in setting up the structure of their enterprise. The effect of applying the statutory norms to shareholders' agreements in close corporations is to give shareholders a protection that they do not need or want and to hinder them in the operation of their business by making it impossible to tailor the corporate form of enterprise to the needs of their business situation.

2. Voting Trusts

Another method of allocating corporate control is by setting up a voting trust. A voting trust is created by a trust agreement among all or some of the shareholders transferring title to their shares to voting trustees who issue to the shareholders certificates of beneficial interest, usually called "voting trust certificates."

The voting trust is not just a "big business" instrument as is sometimes supposed. It is a flexible device that can be exceedingly useful in working out control arrangements in a close corporation.

Expressly sanctioned by statute, the voting trust is available in Mississippi. The Mississippi Business Corporation Act provides:

> Any number of shareholders of a corporation may create a voting trust for the purpose of conferring upon a trustee or trustees the right to vote or otherwise represent their shares, for a period of not to exceed ten (10) years, by entering into a written voting trust agreement specifying the terms and conditions of the voting trust, by depositing a counterpart of the agreement with the corporation at its registered

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[50] See notes 38 through 40 and accompanying text *supra*.

[51] See note 24 *supra*.

office, and by transferring their shares to such trustee or trustees for the purpose of the agreement.[52]

3. Respective Advantages and Disadvantages of Shareholders' Agreements and Voting Trusts

The choice between a shareholders' agreement or a voting trust as a control device may be dictated by the statutory or judicial authority affecting the validity or efficacy of the respective devices in a particular jurisdiction. Thus, a voting trust may be chosen because a statute expressly recognizes its legality and clearly sets forth the procedure for its establishment, while satisfactory statutory or judicial support for a shareholders' agreement cannot be found in that jurisdiction. Similarly, a voting trust may be selected because it is self-executing, while specific performance of a shareholders' agreement may not be available in a particular jurisdiction and would involve risks and delays.

Nevertheless, in most jurisdictions a shareholders' agreement, perhaps including provisions for irrevocable proxies, is usually preferable to a voting trust for allocating control in a close corporation. Most voting trust statutes, including Mississippi's,[53] set a maximum of ten years for the duration of a voting trust. The business situation, however, may require a control arrangement of much longer duration. Similarly, other limitations or conditions in some of the voting trust statutes may prove to be undesirable, such as the requirement that a copy of the trust agreement be deposited with the corporation in order to make information on the terms of the agreement available to all shareholders.[54] Furthermore, a voting trust is somewhat more complicated to set up than a shareholders' agreement. The establishment of a voting trust involves the selection of voting trustees, the transfer of title in the shares to trustees, and the issuance of voting trust certificates.

C. Long-Term Employment Contracts

A shareholder-employee can gain some protection against discharge or diminution in salary by contracting with the corporation for employment at a designated salary for a stated period of time.[55] In addition to

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[52] MISS. CODE ANN. § 79-3-65 (1972).

[53] *Id.*

[54] *See, e.g., id.* ("the counterpart of the voting trust agreement . . . shall be subject to the same right of examination by a shareholder . . . as are the books and records of the corporation, and shall be subject to examination by any holder of a beneficial interest in the voting trust . . . .").

[55] *See generally* Kessler & Hancock, *supra* note 20, at 21-22 (noting that an employment contract and a requirement of cause for removal affords a minority shareholder-officer-employee protection since "[p]ower devices are largely reciprocals of financial return devices").

granting the employee a fixed annual salary, the contract might provide "incentive" compensation, such as a bonus equal to a specified percentage of corporate profits, or options to buy shares in the corporation under preferential terms. Additionally, the contract might contain provisions for severance pay or liquidated damages in the event of breach by the corporation, or provisions obligating the corporation to purchase the employee's stock in the corporation or give him a lifetime pension in the event it does not renew the contract at the end of its term.

Employment contracts as protective devices have, however, definite disadvantages. One disadvantage is uncertainty in regard to the employment term. Even when courts recognize that a corporation may validly enter into a lifetime or other long-term contract with an employee,[56] they are reluctant to infer authority in the officer representing the corporation to bind the corporation to such a contract.[57] Ordinarily, an officer's authority to enter into a lifetime contract must be derived from an express provision in the bylaws, or from a resolution of the board of directors.[58] A second disadvantage is that an employment contract probably cannot be framed to protect an employee against removal from a particular corporate office, from changes in his duties and locale assignments, and from lack of cooperation and various annoyances that those in control may devise to make his work unpleasant. Finally, an employment contract ordinarily will not be specifically enforced,[59] and damages may not be an adequate remedy for a shareholder-employee or other key person who has staked his future on a continuing relationship with the company.

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[56] Although some decisions treated long-term employment contracts as an interference with the directors' managerial powers, most courts have enforced such contracts if "reasonable." *See, e.g.*, Realty Acceptance Corp. v. Montgomery, 51 F.2d 636, 639 (3d Cir. 1930) (corporate president's five-year employment contract was not against public policy); United Security Life Ins. Co. v. Gregory, 281 Ala. 284, 201 So. 2d 853, 854 (1967) (life employment contract held valid); Heaman v. E.N. Rowell Co., 261 N.Y. 229, 185 N.E. 83, 83-84 (1933) (same). *See generally* Meck, *Employment of Corporate Executives by Majority Shareholders*, 47 YALE L.J. 1079 (1938).

[57] *See, e.g.*, Pullman Co. v. Ray, 201 Md. 268, 94 A.2d 266, 271 (1953) (corporate officer has no implied authority to make lifetime employment contract); Chesapeake & Potomac Tel. Co. v. Murray, 198 Md. 526, 84 A.2d 870, 872 (1951) (ordinarily an officer has no implied authority to make lifetime employment contract); Savarese v. Pyrene Mfg. Co., 9 N.J. 595, 89 A.2d 237, 241 (1952) (corporate officer's authority to make lifetime employment contract cannot arise merely by implication). *But see* Hessler, Inc. v. Farrell, 226 A.2d 708, 712 (Del. 1967) (where officer controlled 80 percent of the corporation's stock and the entire board of directors, the board's general acquiescence was sufficient to imply authority to offer lifetime employment contract).

[58] Chesapeake & Potomac Tel. Co. v. Murray, 198 Md. 526, 84 A.2d 870, 872 (1951).

[59] S. WILLISTON, CONTRACTS § 1423 (3d ed. 1968); *see* Montgomery Pipe & Tube Co. v. Mann, 205 So. 2d 660, 662 (Fla. 1968) (court refused to order reinstatement of corporate president). *But see* Collins v. Collins Fruit Co., 189 So.2d 262, 264-65 (Fla. App. 1966) (employment contract enforced against corporation).

The lawyer drafting an employment agreement should usually avoid describing the employment in terms of one of the elective corporate offices. In most instances, the employee should be employed as general manager, sales manager, production supervisor, or an executive in some other nonstatutory position, and his compensation prescribed in that capacity. Then a provision can be added that he will serve without additional compensation as a director if elected by the shareholders and in any corporate office to which he is elected by the board of directors. A clause in the contract might provide, even more generally, that the employee shall serve in an executive capacity, devoting his full time to whatever duties are assigned to him by the board of directors, and that he shall have such title or titles commensurate with the level of compensation provided under the contract, as the directors may assign. To protect the employee against the possibility that the shareholders will fail to make him a director or that the directors will fail to elect him to a corporate office, the contract can expressly state that the employee's compensation shall not be diminished if he is not elected to the directorate or to a corporate office in any particular year. By avoiding reference to employment in terms of statutory offices, the draftsman diminishes the risk that the agreement will be held to contravene the statute conferring management on the directors, or a statute, charter, or bylaw clause providing for an annual election of specified corporate officers by the directors.

II. Stock Transfer Restrictions, Options, and Buy-Outs

A. Why Stock Transfer Restrictions May be Needed

In a close corporation, all or most of the shareholders are in constant and intimate contact, and policy determinations are made with a minimum of formality. Typically, they take part in decisions with little or no attention to the amounts of their respective shareholdings. It is thus not surprising that shareholders in a closely held enterprise usually desire to retain the power to choose future associates.[60] Each shareholder wants to be in a position to prevent outsiders from entering the business if he doubts their integrity or business judgment, or feels that working with them would be unpleasant or unrewarding.

Participants in a close corporation may also want to restrict the transferability of shares to guard against the purchase of shares by competitors or other persons unfriendly to the corporation. Free transferability of shares is particularly undesirable if the shareholders' active participation in the business is necessary to its success. A purchaser of shares may have neither the ability nor the desire to do the work previously

[60] See note 22 *supra*.

performed by his vendor, or he may not be able to work congenially with the other participants. It is often unlikely that his personality and skills would harmonize with and complement those of the existing shareholders. Yet he would be entitled, incident to his share ownership, to examine corporate books and records and to institute a derivative action.

A purchaser interested only in investment would also be a hazard to the enterprise, since there would be a great possibility of friction with the active shareholders. The active participants would probably not be willing to pay a shareholder who contributed nothing in return for his salary. They might feel that the profits of the business were due largely or entirely to their own efforts and talents and would be opposed even to paying substantial dividends to a shareholder not actively contributing to the corporation's success. Differences would be especially likely to occur regarding the respective amounts to allocate to salaries and dividends. When all shareholders of a close corporation participate full time in its affairs, they ordinarily take a substantial part of the earnings of the corporation in salaries rather than in dividends in order to minimize double taxation. This practice, however, is obviously not satisfactory to a shareholder not on the payroll. Conflicts of interest between the active and inactive shareholders might lead to expensive litigation, unfavorable publicity, loss of customers, and impairment of the corporation's credit.

Since enactment of subchapter S of the Internal Revenue Code,[61] restrictions on the transferability of stock have been used to accomplish another purpose. In the absence of transfer restrictions, any shareholder, even against the wishes of his fellow shareholders, can terminate a corporation's eligibility for subchapter S tax status,[62] or can terminate an election of that status already made by the corporation, simply by transferring some or all of his shares to a nonqualifying holder.[63] Splitting up his holdings and transferring shares to numerous persons to increase the total number of shareholders in the corporation to more than the permissible maximum number of shareholders will also destroy subchapter

[61] I.R.C. §§ 1371-1379. The primary feature of a subchapter S corporation is that the corporation's earnings and profits are not subject to corporate income tax since the corporate income is constructively "passed through" and taxed to the shareholders as ordinary income, even if the corporation does not in fact distribute its earnings. Benderoff v. United States, 398 F.2d 132, 134 (8th Cir. 1968).

[62] I.R.C. § 1371(a) defines the eligibility requirements for subchapter S treatment. Among these requirements are that the corporation have no more than ten shareholders and that only individuals, estates, and certain trusts can be shareholders. *Id.* *See generally* Note, *Shareholder Lending and Tax Avoidance in the Subchapter S Corporation*, 67 COLUM. L. REV. 495 (1967).

[63] *See, e.g.*, W & W Fertilizer Corp. v. United States, 527 F.2d 621, 628-29 (Ct. Cl. 1975) (shareholder's transfer of stock to revocable inter vivos trust terminated corporation's subchapter S eligibility), *cert. denied*, 425 U.S. 974 (1976).

S status.[64] Carefully prepared stock transfer restrictions can greatly diminish the risk of arbitrary or inadvertent termination of a corporation's subchapter S eligibility.

B. Kinds of Restrictions on Transfer

Various types of restrictions on the alienability of shares have been used to confine share ownership to persons approved by the original shareholders. The restraints may be classified as follows: (1) absolute prohibitions against the transfer of shares, (2) "consent restraints," requiring approval of transfers by the shareholders, the directors, or a stipulated percentage of one of these groups, (3) provisions limiting transfers to specified classes of persons, for example, families of existing shareholders or the corporation's customers or employees, or prohibiting transfers to other classes of persons, for example, competitors of the business, (4) "first option" provisions granting the corporation, its officers or directors, or other shareholders a preemptive right—sometimes referred to as a right of "first refusal"—to shares which a holder decides to sell, (5) options empowering the corporation, its officers or directors, or the other shareholders to purchase some or all of the shares of a holder on a happening of specified events,[65] (6) buy-out arrangements for the transfer of a deceased or disabled holder's shares to the corporation or to the other shareholders at a stipulated price or at a valuation determined by formula, (7) provisions for the corporation's repurchase or redemption of the shares of a holder who ceases to be an employee of the corporation or provisions for the other shareholders to purchase his shares, and (8) provisions for the redemption or "call" of common stock at the option of the corporation or its board of directors.

These categories are set up only for convenience of discussion, since the types of restraints are subject to almost infinite variation and combination. An instrument may contain a number of restrictive provisions, the nature and scope of which vary with the type of transfer contemplated, or with the identity of transferors or transferees. Similarly, it may establish a restriction but exempt stipulated transfers from its coverage. For example, the instrument may grant first options to the corporation or other shareholders, but exempt from the option require-

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[64] For the first five years under subchapter S status, a corporation can consist of no more than ten shareholders, unless the number is increased by inheritance. After the initial five-year period, the maximum number of shareholders is increased to fifteen. I.R.C. § 1371.

[65] Possibilities a draftsman may want to consider in formulating options include the death of a holder, the disability of a holder, the severance of employment with the corporation, the holder's becoming bankrupt or insolvent, and the holder's acquiring an interest in a competing company.

ments transfers by a shareholder to members of his own family or to employees of the corporation.

C. *Factors Courts Consider in Determining Validity of Restrictions*

From the early cases to the present time, absolute restrictions on the alienability of shares have almost without exception been held invalid.[66] However, even in the absence of specific statutory sanction, courts sustain restrictions that are "reasonable" in the light of all the circumstances of the particular case, at least if the restrictive provisions are embodied in the articles of incorporation or in a shareholders' contract.[67]

Factors courts have considered, in the absence of a controlling statute, to determine whether restrictions are reasonable include the degree of restraint on the power to alienate, the length of time the restriction is to remain in effect, the method used in determining the transfer or option price of shares subject to the restraint, the likelihood of the restriction contributing to the attainment of corporate objectives, the possibility that a hostile shareholder would seriously injure the corporation, and the likelihood that the restriction will promote the best interests of the enterprise as a whole. The underlying test seems to be whether the restraint is sufficiently needed by the particular enterprise to justify overriding the general policy against restraints on alienation.[68]

1. Legislation on Share Restrictions

In the last few years, several states have adopted legislation specifically dealing with the validity of share restrictions or the instruments embodying such restrictions. This legislation varies considerably from state to state. The New Jersey statute is among the most elaborate. It enumerates the following types of restrictions on the transfer of shares or of other securities having conversion or option rights, and declares them to be enforceable: (1) a requirement obligating the owner to offer the corporation or other holders of the corporation's securities prior

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[66] O'Neal, *Restrictions on Transfer of Stock in Closely Held Corporations: Planning and Drafting*, 65 HARV. L. REV. 773, 777-78 (1952).

[67] Ingram Corp. v. Cook, 280 So. 2d 400, 402 (La. App. 1973) (upheld stock purchase agreement requiring employee to resell stock to corporation if his services were terminated within seven years); Fayard v. Fayard, 293 So. 2d 421, 423 (Miss. 1974) (citing 2 F. O'NEAL, CLOSE CORPORATIONS: LAW AND PRACTICE § 7.06, at 18 (2d ed. 1971)); Huffman v. Sho-Me Power Cooperative, 356 Mo. 832, 204 S.W.2d 276, 280 (1947) (held valid option of corporation to repurchase stock within a reasonable time).

The restrictions, of course, may be waived or amended by custom and usage. Coleman v. Coleman, 191 So. 2d 460, 470 (Fla. App. 1966).

[68] Fayard v. Fayard, 293 So. 2d 421, 423 (Miss. 1974) (quoting 2 F. O'NEAL, CLOSE CORPORATIONS: LAW AND PRACTICE § 7.06, at 18 (2d ed. 1971)).

opportunity, to be exercised within a reasonable time, to buy the securities, (2) a purchase and sale agreement obligating the corporation, any holder of its securities, any other person, or any combination of the foregoing to purchase any of the corporation's securities, (3) a provision requiring consent by the corporation or the holders of any class of securities to any proposed transfer of the restricted securities or approval of the proposed transferee to the restricted securities, (4) a prohibition against the transfer of the restricted securities to designated persons or classes of persons, if such designation is not manifestly unreasonable, (5) a provision designed to maintain the status of the corporation as an electing small business corporation under subchapter S of the Internal Revenue Code.[69] In addition, the New Jersey statute provides that other transfer restrictions on shares or securities having conversion or option rights shall also be enforceable, if they are "reasonable."[70] The statute encourages the use of untested restrictions by providing that the corporation will automatically become vested with an option to purchase securities if a restriction to which they are subject is held to be unauthorized.[71]

Mississippi does not have a statutory section similar to New Jersey's. The only reference to stock restrictions in the Mississippi Business Corporation Act states that a provision restricting the transfer of shares may be inserted in the articles of incorporation.[72]

2. Necessity of Placing Restraints on Share Certificates

A charter, bylaw, or shareholders' agreement that imposes restrictions on the transferability of shares should direct that the restrictions be noted on each share certificate. Care must be taken that the reference is sufficient to put prospective purchasers of shares on notice that the shares are subject to the transfer restrictions. Section 8-204 of the Uniform Commercial Code requires that any restrictions must be "noted conspicuously on the security" to be effective against a transferee without actual knowledge of the restrictions.[73]

D. Options and Buy-Outs

1. Use of Successive Options

Options may be given successively to the corporation and then to

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[69] N.J. STAT. ANN. § 14A: 7-12(3) (West 1969).

[70] *Id.* § 14A: 7-12(2).

[71] *Id.* § 14A: 7-12(4).

[72] MISS. CODE ANN. § 79-3-105(i) (1972).

[73] U.C.C. § 8-204. Section 8-204 is codified in Mississippi at MISS. CODE ANN. § 75-8-204 (1972).

the other shareholders, or vice versa. Occasionally, directors or officers of the company are made successive optionees. Whenever shareholders are given options, shareholders who exercise their options may be given a privilege to purchase shares rejected by the other shareholders. If a provision is made for successive optionees, the order in which the options are to be exercised must be clearly stated. The granting of an option first to the corporation, and then to the other shareholders, overcomes some of the possible objections to making the corporation an optionee.[74] Under this arrangement, if the corporation does not have sufficient funds available to purchase at the time a holder decides to sell, the shareholders are still in a position to exclude undesired outsiders by purchasing the shares themselves.

2. Combining First Options and Buy-Out Arrangements

Draftsmen frequently combine first options with definite commitments by the corporation[75] or by the other shareholders[76] to purchase the shares of a holder in the event of his death, or upon the occurrence of other specified events.[77] Events such as the death or disability of the holder may result in serious financial and legal problems for the holder's family, the corporation, and the remaining shareholders—problems that are not adequately met by first option provisions. For instance, first options alone do nothing to solve the problems of a deceased shareholder's family and estate. During his life, the shareholder probably held a corporate office and received liberal compensation for his services. Upon the shareholder's death, however, his salary ceases, and his heirs are left shares that have a high value in the estate,[78] but carry prospects for very light dividends.[79] Furthermore, first options do not

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[74] One possible objection is that most statutes limit a corporation's purchasing authority to funds from a specified source. *See, e.g.,* MISS. CODE ANN. § 79-3-9 (1972) ("purchase of its own shares . . . shall be made only to the extent of unreserved and unrestricted earned surplus").

[75] *See id.* (defining right of corporation to purchase its own shares).

[76] Purchase obligations are generally imposed on the shareholders or the corporation through a shareholders' agreement or an agreement between the shareholders and the corporation, rather than in the charter or bylaws. These agreements are matters solely between the shareholder and the corporation. Jack Cole-Dixie Highway Co. v. Red Ball Motor Freight, Inc., 254 So. 2d 734, 740 (Miss. 1971). If the obligation is imposed on the shareholders, the contract is usually designated a "buy-and-sell" agreement; if the obligation is imposed on the corporation, the contract is usually designated a "stock-purchase" or "stock-retirement" agreement.

[77] *See generally* Kahn, *Mandatory Buy-Out Agreements in Stock of Closely-Held Corporations,* 68 MICH. L. REV. 1 (1969).

[78] Shares held in a close corporation in Mississippi are included in the decedent's gross estate. *See* MISS. CODE ANN. § 27-9-7 (Supp. 1977). *See also* Milam, *Estate Planning and Mississippi's Estate Tax,* 46 MISS. L.J. 27, 29 (1975).

[79] *See* Comment, *supra* note 21, at 1191-92 nn.5 & 6.

protect the estate from being forced to sell stock for much less than its value to meet probate expenses, estate and inheritance taxes, and other obligations. The corporation and other shareholders are usually the only prospective purchasers in a close corporation, and first options do not compel the optionees to purchase the shares.[80] Particularly when the deceased owns only a minority interest, the optionees may simply wait in an attempt to force the estate to sell below the option price.[81] Thus, the estate may not be able to realize the fair value of the shares. Imposing a duty on the corporation or surviving shareholders to purchase the shares at a specified price, or at a price to be determined by formula, protects a deceased shareholder's estate against this risk.

A draftsman should also investigate the desirability of a buy-out arrangement in anticipation of a holder's becoming incapacitated, since the risk of a long-term disability before age sixty-five is considerably greater than that of death. If one of the principal participants in a small business becomes disabled, the danger of internal conflict is greatly increased. A disabled participant usually continues to share in the earnings of the business, even though he contributes little or nothing to the corporation's operations.

A properly drafted disability buy-out agreement can help meet this problem. The agreement can provide for disability payments to a disabled participant for a specified period of time, and for a buy-out of his interest to be automatically "triggered" at the end of that period, so that his shares are transferred to the corporation or the other shareholders at an agreed price or a price to be determined by formula.

The agreement should define disability, fix the amount and duration of disability payments, and determine when the buy-out is to occur if it is to be a mandatory buy-out, or when the option to purchase can be exercised if it is to be an optional buy-out. The agreement should also indicate the source of funds for the buy-out and the method for determining the purchase price. Furthermore, both the possibility that the disabled shareholder will recover and the possibility that he will die before the buy-out has been completed must be considered.

3. Setting a Transfer Price for Shares

A method of fixing the transfer price of shares subject to a first-option or buy-out arrangement should always be determined in advance and embodied in the option or buy-out contract.[82] Nothing should be left

[80] *See, e.g.*, Paine v. Ludlam, 169 Miss. 1, 7, 152 So. 486, 488 (1934) (upholding refusal of stockholders to purchase shares of retiring stockholder under provisions of option).

[81] Surviving shareholders could also squeeze out the minority shareholders' estate beneficiaries by voting themselves large salaries. Comment, *supra* note 21, at 1191 n.5.

[82] Mississippi provides no statutory guidance for determining methods of valuation.

for settlement by negotiation at the time of a share transfer, since agreement can be reached much more easily while buyer and seller are unknown. If the shareholders are about the same age and in good health, the possibility that a shareholder will suffer a loss through the use of a particular method of valuation is counterbalanced by the possibility that he will realize a gain. However, the absence of a recognized selling price for shares in a close corporation makes the task of fixing a stock transfer price or of choosing a price formula difficult, even though it is made in advance. Value involves conjecture and prediction. Transfers usually occur many years after the restrictions are established, and the value of the shares may have significantly changed. Furthermore, no one valuation formula is equally appropriate for all businesses.

Numerous methods have been used or proposed for setting the price of shares in a closely held corporation: computing their book value,[83] setting the price at par or some other arbitrary figure mutually agreed on by the shareholders at the time the restrictions are imposed,[84] ascertaining the market price of the shares or the highest price that a bona fide prospective purchaser will offer for them,[85] capitalizing earnings,[86] appraisal,[87] authorizing the board of directors or the other shareholders to set a value, using the valuation imposed by tax authorities for estate or inheritance tax purposes,[88] and combining two or more of these meth-

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Comment, *Valuation of Shares in a Closely Held Corporation,* 47 MISS. L.J. 715, 719 (1976). Most courts, however, will uphold an agreement fixing stock value if it is fair and equitable. *See, e.g.*, Jones v. Harris, 63 Wash. 2d 559, 388 P.2d 539, 541 (1964).

[83] If there is only one class of stock outstanding, the book value of a share is determined by dividing the corporation's net worth by the number of shares of outstanding stock. Schaffer v. Below, 278 F.2d 619, 625 (3d Cir. 1960). If there are two or more classes of stock outstanding, an amount sufficient to satisfy the liquidation preferences of outstanding preferred stock is first deducted from net worth; the remainder is then divided by the number of outstanding common shares. Palmer v. Chamberlain, 191 F.2d 532, 535 (5th Cir. 1951). *See generally* Comment, *supra* note 82.

[84] Since this approach is inflexible, it is best used with a provision for periodic revaluation.

[85] This method is suited only to first options and is usually accompanied by a definite time period during which the optionees can purchase the shares at the price offered. Upon expiration of the time period, the prospective purchaser is entitled to the optionees' acceptance of his offer, provided it is in fact a bona fide offer.

[86] *See generally* Comment, *supra* note 82, at 726-30 (discussing factors to be considered in determining capitalization of earnings). This approach is undesirable because of the difficulty of calculation and possible inaccuracy.

[87] The typical appraisal provision states that the optionee or purchaser shall select one appraiser, the offeror or vendor a second, and that the two appraisers or an independent third party shall select a third appraiser. The decision of a majority of the appraisers should be binding. The disadvantage of this method is the potential expense.

[88] Under this approach—which of course can be used only after the death of the holder—the "fair market value" standard applies. Comment, *supra* note 82, at 719-20 (citing Mississippi State Tax Comm'n Estate Tax Law, Filing Instructions 2-3 (1975) (state law); Treas. Reg. § 2031-2(b), Treas. Dec. 7327, 1974-2 C. B. 295 (federal law)).

ods. Usually, the most satisfactory solution will be to provide for a price in dollars to be set by the shareholders and revised periodically and the use of appraisal as an alternative method of valuation if the shareholders cannot agree or simply neglect to make the periodic revaluations. The draftsman may want to require the appraisers to base their calculations on the price last agreed upon by the shareholders and to modify that price only to the extent that the value of the shares has changed between the setting of the price and the transfer. This combination has several positive advantages. First, valuation clauses for the combination are relatively simple to draft. Second, disputes about the transfer price are minimized because the base price is one on which the parties themselves have agreed. Third, consummation of transfers is expedited because there is no complicated formula to apply. Finally, shareholders can usually plan their estates with safety because they know the approximate transfer price of their shares.

4. Funding with Business Insurance

When the option or obligation to purchase is conditioned on the death of a holder, business insurance is frequently used to insure ready availability of sufficient cash to buy the holder's interest. The shareholders' lives are insured so that when a holder dies, the policy proceeds are applied to the purchase of his shares.[89] Funding buy-out arrangements with life insurance is advantageous both to the corporation and to the decedent's estate. The corporation will have the necessary amount immediately available to purchase the decedent's shares, and the decedent's estate will receive cash.

An option or obligation to purchase a shareholder's interest in the event of his disability can be funded at least to a limited extent with insurance. A policy on a shareholder's life, of course, will not provide funds if he should become disabled. The standard disability policy does not provide a lump-sum payment to be used for buy-out purposes. A disability policy does, however, provide periodic payments to help finance an installment purchase. Recently, a few insurance companies have made available disability policies that provide a lump sum for a complete buy-out.

E. Estate and Gift Tax Consequences of Share Transfer Restrictions and Buy-Out Arrangements

Restrictions on the transfer of shares and buy-out arrangements

[89] If the corporation is the optionee, only one insurance policy is needed for each shareholder. But if the shareholders agree to purchase the shares, each shareholder must own and pay for an insurance policy on the life of each of the other shareholders. Comment, *supra* note 3, at 1194 n.20.

have significant tax consequences.[90] Of primary importance is their effect on share valuations for federal estate tax purposes. Carefully drawn restrictions and buy-out arrangements, obtained by arm's length bargaining, can often fix a ceiling on the value of a corporation's shares for estate tax purposes. The best practice for the draftsman is to determine a formula or price-fixing device he believes will result in a transfer price that approximates the shares' intrinsic value. Attempts to depress the value of shares for tax purposes are likely to lead to significant problems. The draftsman, however, must not adopt a price-fixing method that will overvalue the shares and thus increase taxes. The draftsman must also consider that the death or withdrawal of a particular shareholder may injure the business and decrease the worth of the shares.

III. Problems of Dissension, Stalemate, and Deadlock[91]

Dissension among the shareholders falls with a heavy impact in a close corporation. A large part of the shareholders' assets may be tied up in the company, and salaries received from employment by the company may furnish their principal livelihood. Frequently each shareholder is guaranteed membership on the board of directors and a particular office by a shareholders' agreement. Since the shareholders are active in the business, they are in constant contact with each other. Because of this intimacy, friction is likely to continue to grow once dissatisfaction or distrust has developed.

In the close corporation, the relationships among the participants, like those among partners, require close cooperation and a high degree of good faith and mutual respect. But when these conditions are absent, a participant does not have a partner's power of dissolution. Similarly, a participant in a close corporation does not have the alternative a shareholder in a publicly held corporation has. In a publicly held corporation a dissatisfied shareholder can sell his shares without great financial loss. Shares in a close corporation cannot, however, be so easily disposed of. Anything less than a controlling interest does not have a ready market. If there is dissension in the corporation, a minority interest is likely to appear even less inviting to a prospective purchaser. Furthermore, if there are restrictions on the transferability of shares, an irritated and obstinate associate can prevent the sale of shares.

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[90] For an excellent analysis of the tax ramifications of share transfer restrictions in Mississippi, see Comment, *supra* note 82.

[91] This area of close corporation planning requires more ingenuity on the part of the draftsman than any other. First, the participants frequently do not consider the possibility of insoluble disagreement. Second, the participants may be reluctant to include dispute resolution provisions, since the closely held corporation is frequently a joint venture among friends or relatives. Note, *supra* note 1, at 175.

When a shareholder in a close corporation wants out but cannot dispose of his shares without incurring a heavy financial loss, there often develops a state of affairs sometimes referred to as a stalemate. The dissatisfied shareholder's services may be necessary for the efficient operation of the business, or he may be frozen into the directorate and an officership by a shareholders' agreement or other control arrangement. But, in exasperation, he may consistently refuse to cooperate with his associates. Indeed, he may effectively obstruct the operation of the corporation. Strife among the participants frequently results in incessant litigation and sometimes in physical violence. This state of affairs, of course, harms the enterprise and results in serious losses to all shareholders.

Even more serious problems exist in the area of deadlocks, which frequently occur among the shareholders and directorates of close corporations. The distribution of voting shares is often such that an eventual impasse is probable. Not uncommonly the shares are equally divided between two shareholders or groups of shareholders, and divisions among the directors are likely to occur. The granting of veto powers to some or all of the shareholders also enhances the risk of corporate paralysis.[92]

One possible solution for dissension or deadlock in a close corporation is an arrangement for certain shareholders to buy out others if a dissension or deadlock develops. Another possibility is a special arrangement for dissolution of the corporation. A third approach is to provide for arbitration of disputes.

A. Use of Buy-Out Arrangements

Buy-out arrangements[93] may take any of a number of forms. If the shares of the corporation are divided evenly between two shareholders, either shareholder could be empowered, on the occurrence of a deadlock, to state a price he will take for his shares or will give for the other party's shares. The other party would then have the choice of buying or selling at that price. Another approach, especially useful in a corporation with a number of shareholders holding an unequal amount of shares, is to provide each shareholder with the right to dissolve the corporation after first offering his shares to the other shareholders at a predetermined price or at a price to be fixed by formula. A third arrangement is to provide that if a dispute cannot be resolved within a specified period of

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[92] *See* Benintendi v. Kenton Hotel, 294 N.Y. 112, 60 N.E.2d 829, 831 (1945) (refusing to enforce bylaw requiring unanimous vote for director action on ground that the bylaw increased the possibility of corporate deadlock). *But see* Sterling Indus., Inc. v. Ball Bearing Pen Corp., 298 N.Y. 483, 84 N.E.2d 790, 793 (1949) (possibility of deadlock insufficient to invalidate bylaw giving minority shareholders a veto).

[93] For an extensive review of buy-out arrangements, see Kahn, *Mandatory Buy-Out Arrangements for Stock of Closely Held Corporations*, 68 MICH. L. REV. 1 (1969).

time, the majority shareholder or shareholders will buy out the minority at a price to be determined by formula.

Buy-outs simultaneously preserve the corporation as a going concern and give withdrawing shareholders a fair price for their interest. A disadvantage of the use of options and buy-outs is that shareholders with readily available funds, by deliberately provoking a dispute or creating a deadlock and thus triggering the option or buy-out, might squeeze out a minority shareholder who does not have ready cash to protect his interest in the business.

B. Use of Special Dissolution Provisions

It may be advisable in some close corporations to set up special provisions for dissolution in a shareholders' agreement or in the articles or bylaws. Each shareholder might be given the power to dissolve the concern at will,[94] or each shareholder might be given power to dissolve if the other shareholders refuse to purchase his shares at a predetermined price. Provisions might also be made for compulsory dissolution of the corporation on the occurrence of specified events, such as the death or disability of any shareholder or of a particular shareholder, or the failure of the corporation to pay dividends in a specified amount for a specified period of time. Also, each shareholder or a designated shareholder might be given an option to dissolve the corporation or require the other shareholders to purchase his shares if he does not receive a specified sum from the corporation each year in salary and dividends.

C. Arbitration

Since disputes that render the management of a company ineffective must be dealt with promptly, the customary delays of litigation can be catastrophic to a deadlocked company. Arbitration has distinct advantages over litigation as a method of settling disputes that paralyze closely held corporations; it is usually quicker and less expensive.[95] Another advantage of arbitration is that hearings can be held in private, and confidential matters can be safeguarded. A corporation almost invariably suffers if its affairs are publicized in judicial proceedings. Furthermore, arbitration can result in more workable decisions than litigation. Judges and juries must find for one litigant or the other, but arbitrators can mold their decision to fit the needs of a particular business problem, as well as make management and policy decisions.[96] Arbitra-

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[94] *Cf.* MISS. CODE ANN. § 79-12-61 (Supp. 1977) (partnership may be dissolved upon the express will of any partner.)

[95] *See generally* Sturges, *Arbitration and Award,* 25 MISS. L.J. 181 (1954).

[96] *See generally* Rehnquist, *A Jurist's View of Arbitration,* 32 ARB. J. 1 (1977).

tors can also grant relief that may not be available under similar circumstances in the courts. Moreover, the power to select the arbitrators affords persons using the arbitral process an enormous advantage over litigants since businessmen intimately familiar with the company involved or with similar businesses can be chosen.

Most objections to the use of arbitration as a method of settling disputes in closely held corporations center around the supposed unfitness of the arbitral process in formulating corporate policy and making managerial decisions.[97] Many practitioners are firmly convinced that the proper function of arbitration is to adjudicate rather than create rights, that decisions on matters of business judgment reached by this process will not be accepted by the participants, and that arbitration simply cannot establish and maintain a structure for the intimate and continuing relationships incident to the management of a closely held corporation. Moreover, they contend that clauses cannot be drafted to state with exactness managerial questions subject to arbitration.

Another objection to the use of arbitration in settling disputes in close corporations is grounded on a belief that once shareholders or directors have reached an impasse, arbitration is futile because the participants cannot thereafter effectively work together. The argument supporting this objection is that shareholders in close corporations are normally in constant and intimate contact, that they frequently perform essential tasks in the enterprise, and that strife breeds an animosity precluding future cooperation in the business's operation. In other words, a deadlock that cannot be broken by negotiation dooms the corporation upon its occurrence; dissolution is the only realistic option available to the parties. This pessimistic view fails to give proper weight to the moral force of arbitration and the disposition of men to accept a determination reached fairly by disinterested parties. Although the effect of personal relations upon management cannot be gainsaid, persons who are not congenial can sometimes work together effectively.

Other objections are based on supposed legal obstacles to the use of arbitration. For example, the arbitration of disputes on matters customarily within the province of the directors may be held to infringe upon the statutory norm vesting corporate management and control in the board of directors.

At common law an agreement to arbitrate future disputes, though legal, could not be specifically enforced.[98] Such an agreement was said to be revocable. Until an award had been rendered, any party could terminate the arbitrator's power. A further disadvantage was a party's ability to resort to the courts and thereby circumvent the agreement to

[97] *See, e.g., In re Hess*, 108 N.Y.L.J. 555 (1942).

[98] Jones v. Harris, 59 Miss. 214, 215 (1881).

arbitrate. These common law rules were founded upon the supposition that an agreement to arbitrate future disputes ousted the courts of their jurisdiction.

In some states, and apparently in Mississippi, the common law rules governing agreements to arbitrate future disputes have not been modified. The Mississippi statute refers only to the submission of existing disputes to arbitration, not to agreements to arbitrate disputes that might occur in the future.[99] The result is that in Mississippi an agreement among participants in a close corporation to arbitrate any future dispute is not enforceable.[100]

Some jurisdictions have avoided this difficulty by legislation similar to the present New York arbitration statute, which clearly indicates that arrangement can be made for the arbitration of any future controversy.[101]

CONCLUSION

The close corporation is a flexible entity that can be adapted to meet the needs and desires of each participant. Flexibility is not, however, an inherent characteristic; it must be facilitated through careful planning, drafting, and counseling. The various tailoring techniques discussed in this Article can be used to advantage in many situations. The quality of the final product will depend on the resourcefulness and creativity of the particular draftsman. The ability to break away from traditional thinking on corporate management and to develop control patterns that ensure adequate treatment of all participants will determine the drafter's success. The task is not simple. In some respects, Mississippi's corporation laws may hinder the lawyer organizing a close corporation. But even with the statutory restrictions, the lawyer can, through the exercise of careful planning, drafting, and counseling, tailor the corporate form to avoid possible damage. This is preventive law.

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[99] MISS. CODE ANN. § 11-15-1 (1972) provides in part: "All persons . . . may, by instrument of writing , submit to the decision of one or more arbitrators, any controversy which may be existing between them . . . ."

[100] *See, e.g.*, McClendon v. Shutt, 237 Miss. 703, 706-07, 115 So. 2d 740, 741 (1959) (either party may revoke an agreement to submit to arbitration at any time before an award has been made); Machine Prods. Co. v. Prairie Lodge, 230 Miss. 809, 824-28, 94 So. 2d 344, 348-50 (1957) (statute did not change common law rule on revocability); Standard Mill Work & Supply Co. v. Mississippi Steel & Iron Co., 205 Miss. 96, 113, 38 So. 2d 448, 452 (1949) (en banc) (either party may revoke submission to arbitration before award is made); Jones v. Harris, 59 Miss. 214, 215 (1881) (same).

[101] *E.g.*, CAL. CIV. PROC. CODE § 1281 (West 1972); FLA. ARB. CODE ch. 682, § 682.02 (1975); ILL. ANN. STAT. ch. 10, § 101 (Smith-Hurd Supp. 1978); LA. REV. STAT. ANN. § 9:4201 (West 1950); N.Y. [CIV. PRAC.] LAW § 7501 (McKinney 1963).

JEOPARDY AND TERMINATION ASSESSMENTS UNDER THE TAX REFORM ACT OF 1976—DO THEY MEET CONSTITUTIONAL DUE PROCESS REQUIREMENTS?

*Frank J. Hammond, III**

To expedite the collection of income tax[1] whose collection is or appears to be imperiled, the Internal Revenue Service utilizes two summary procedures: the jeopardy[2] and termination[3] assessment provisions of the Internal Revenue Code. The jeopardy assessment provision allows the Secretary to make a summary assessment after the due date of the taxpayer's return,[4] while the termination provision allows immediate summary assessment.[5] These paradigms of efficiency, widely though improperly used in enforcement of the criminal laws,[6] have proven to be

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[1] The termination assessment provision, I.R.C. § 6851, applies only to income tax, while the jeopardy assessment provision, *id.* § 6861, applies to income, estate, and gift taxes. The term "summary assessment" is used in this Article to refer to §§ 6851 & 6861 assessments.

[2] *Id.* § 6861.

[3] *Id.* § 6851.

[4] See notes 29 through 39 and accompanying text *infra*.

[5] See notes 40 through 43 and accompanying text *infra*.

[6] The recent increase in the use of these summary assessment provisions has been attributed to the 1971 drug traffic control program launched by President Nixon. This program was designed to coordinate the resources of various governmental agencies in the war against crime. *See generally* Comment, *The Use of Jeopardy Assessments in Narcotics Enforcement*, 9 J. MAR. J. OF PRAC. & PROC. 262 (1975); Note, *Narcotics Offenders and the Internal Revenue Code: Sheathing the Section 6851 Sword*, 28 VAND. L. REV. 363 (1975). Upon receiving notification of the arrest of a suspected drug dealer, the Internal Revenue Service would terminate the alleged dealer's taxable year and assess a deficiency based on projected earnings from the sale of drugs. *See* Comment, *supra*, at 262. The assets of the suspected dealer would then be seized to cover the assessed deficiency. *Id.* Since the Internal Revenue Service would make the assessment immediately with little or no investigation into the taxpayer's financial background, *see* Tarlow, *Criminal Defendants and Abuse of Jeopardy Tax Procedures*, 22 U.C.L.A. L. Rev. 1191, 1192 (1975), the estimated income upon which the tax was based generally yielded a tax at least equal to the value of the seized assets. *See* Aguilar v. United States, 501 F.2d 127, 129-30 (5th Cir. 1974) (amount assessed was exactly equal to amount of cash uncovered plus value of seized truck); Clark v. Campbell, 501 F.2d 108, 117 n.28 (5th Cir. 1974) (amount assessed exceeded value of seized assets), *cert. denied*, 423 U.S. 1091 (1976); Lucia v. United States, 474 F.2d 565, 574-75 (5th Cir. 1973) (IRS based yearly assessment on seizure of $28,780,

extremely effective methods of collecting taxes.

Because of a lack of adequate procedural safeguards under the prior statutory scheme, especially in the termination assessment section, the operation of these provisions upon the taxpayer was often severe. Prior to amendment, the taxpayer was afforded no preseizure or immediate postseizure hearing.[7] Thus, if the taxpayer's assets were seized pursuant to the assessment, irreparable harm could result because of the delay in his opportunity to litigate his tax liability. In fact, the summary seizure of a taxpayer's assets was in one case directly responsible for his inability to defend an associated criminal charge.[8]

These procedures have been amended in an attempt to correct the provisions' deficiencies.[9] The progressing rectification of this imbalance in governmental power and procedural safeguards began in the courts. Rather than dealing with the harsh impact of the summary assessment provisions on a constitutional due process level, however, the Supreme Court relied on statutory interpretation to alleviate the taxpayer's plight.[10] Congress then responded to the Court's lead by providing, in the Tax Reform Act of 1976, for administrative and judicial review of jeopardy and termination assessments.[11]

This Article will examine the operation of the jeopardy and termination assessment procedures and will review the procedural safeguards provided by the Internal Revenue Code. These provisions and safeguards will then be examined in light of constitutional requirements, and issues left unanswered by the Tax Reform Act will be discussed. Although the Supreme Court has not ruled on the constitutionality of the summary assessment provisions in many years[12] and serious issues are as yet unresolved, it appears highly unlikely, in view of the Tax Reform Act's safeguards, that a due process attack on these provisions would be fatal to their constitutional validity.

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which represented one day's receipt from illegal gambling); Rinieri v. Scanlon, 254 F. Supp. 469, 474 (S.D.N.Y. 1966) (IRS agent testified that he made the amount of tax due equal the amount of money seized).

[7] See notes 34 & 42 and accompanying text *infra*.

[8] *See* Commissioner v. Shapiro, 424 U.S. 614, 633 (1976) (taxpayer unable to post bail on unrelated criminal charge in Israel). *See generally* Tarlow, *supra* note 6, at 1210.

[9] See notes 118 through 160 and accompanying text *infra*.

[10] *See* Commissioner v. Shapiro, 424 U.S. 614, 632 (1976) (Anti-Injunction Act does not require dismissal of suit to restrain collection of jeopardy assessment where facts underlying the assessment are not available to taxpayer); Laing v. United States, 423 U.S. 161, 183-84 (1976) (applying procedural safeguards of jeopardy assessment provision to § 6851 termination assessment).

[11] I.R.C. § 7429. Congress also responded by amending § 6851 to provide more adequate safeguards for the taxpayer who is subjected to a termination assessment. See notes 69 through 74 and accompanying text *infra*.

[12] The Supreme Court upheld the constitutionality of a summary assessment provision in 1931. Phillips v. Commissioner, 283 U.S. 589, 595 (1931).

I. Procedural Aspects of the Assessment Provisions

A. *Ordinary Assessments*[13]

The internal revenue system is based on a self-assessment principle[14] under which an assessment of the tax shown on the return filed by the taxpayer is made by either the appropriate District Director's Office or the Service Center.[15] Buttressing the self-assessment system is the so-called deficiency assessment, based on amounts that have been previously assessed or that are allegedly owing in excess of the amount due on the return.[16] Before a deficiency may be assessed, however, the taxpayer is normally entitled to a statutory notice of the deficiency[17]—his "ticket to the Tax Court."[18] Within ninety days[19] of proper mailing of the notice,[20] the taxpayer may seek a redetermination of the deficiency

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[13] A detailed examination of the ordinary assessment procedure is beyond the scope of this paper. For a discussion of the entire assessment-deficiency field, see Odell, *Assessments: What are They—Ordinary? Immediate? Jeopardy?*, 31 N.Y.U. Inst. on Fed. Tax. 1495, 1498-1504 (1973).

[14] *See In re* I.J. Knight Realty Corp., 431 F. Supp. 946, 951 (E.D. Pa. 1977).

[15] I.R.C. § 6201(a). The actual assessment of the tax occurs when the Secretary's representative signs a summary record of assessment based on the declared tax liability. *Id.* § 6203; Treas. Reg. § 301.6203-1 (1961).

[16] *See* I.R.C. §§ 6211-6216. The definition of a deficiency is found in *id.* § 6211(a) which provides:

> [A deficiency is] the amount by which the tax imposed . . . exceeds the excess of—
>
> (1) the sum of
>
> (A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus
>
> (B) the amounts previously assessed (or collected without assessment) as a deficiency, over—
>
> (2) the amount of rebates, as defined in subsection (b) (2), made.

[17] *Id.* § 6212(a).

[18] Corbert v. Frank, 293 F.2d 501, 502 (9th Cir. 1961).

[19] I.R.C. § 6213(a). The 90 day period is extended to 150 days if the notice of deficiency is addressed to a person outside the United States. *Id.* The 90 day period begins on the date of mailing, not on the day of receipt. Wilson v. Commissioner, 564 F.2d 1317, 1319 (9th Cir. 1977) (*per curiam*). Furthermore, for determining the start of the 90 day period, mailing of the notice to an agent of the taxpayer is not the equivalent of mailing directly to the taxpayer himself. DiViaio v. Commissioner, 539 F.2d 231, 234 (D.C. Cir. 1976).

[20] *See* I.R.C. § 6212(a) (Secretary is authorized to send notice of deficiency by registered or certified mail). If sent by registered or certified mail to the taxpayer's last known address, the notice of deficiency is valid regardless of whether the taxpayer actually receives it. United States v. Eisenhardt, 437 F. Supp. 247, 248 (D. Md. 1977); *see* Rappaport v. United States, 419 F. Supp. 1236, 1237 (N.D. Ill. 1976) (*mem.*) (§ 6212(a) does not require actual receipt of the notice).

There is, presumably, no due process problem if the taxpayer does not actually receive notice since I.R.C. § 7422 provides an alternative remedy of paying the tax and suing for

by filing a petition with the Tax Court.[21] This "ninety-day letter" is essential to the jurisdiction of the Tax Court[22] and during the ninety day period no further assessment or levy on assets may be imposed.[23] If a petition to the Tax Court is timely filed by the taxpayer, the prohibition on assessment and levy is extended until the Tax Court decision becomes final,[24] despite the anti-injunction provisions of the Internal Revenue Code.[25]

The taxpayer may waive his right to the notice of deficiency.[26] By doing so, however, he also waives his right to Tax Court litigation. In this situation, the asserted deficiency may be assessed immediately and collection may be initiated by levy upon the taxpayer's assets.[27]

Since the taxpayer has a clear right to preassessment litigation in Tax Court under the ordinary assessment procedure, the taxpayer's right to a hearing prior to property seizure is satisfied.[28] There would therefore seem to be no constitutional due process problem connected with the ordinary assessment procedure.

B. Jeopardy Assessments

In addition to the ordinary procedure for collecting taxes owed to

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a refund in district court. Berger v. Commissioner, 404 F.2d 668, 674 (3d Cir. 1968), *cert. denied*, 395 U.S. 905 (1969); Brown v. Lethert, 360 F.2d 560, 562 (8th Cir. 1966).

[21] I.R.C. § 6213(a).

[22] Laing v. United States, 423 U.S. 161, 165 n.4 (1976); *see* McGee v. United States, 380 F. Supp. 801, 802 (N.D. Ind. 1974) (the deficiency notice is a prerequisite for Tax Court litigation). The type of assessment made determines whether the taxpayer is entitled to the notice of deficiency and thus to a Tax Court redetermination. Fendler v. Commissioner, 441 F.2d 1101, 1102-03 (9th Cir. 1971) (*per curiam*). Accordingly, the Commissioner cannot defeat Tax Court jurisdiction by using another form of notice when the 90 day letter is required. *Id.* at 1102.

[23] I.R.C. § 6213(a).

[24] *Id.* The Tax Court decision becomes final upon: (1) the expiration of the time for filing a notice of appeal if no notice is filed, (2) the expiration of the time for filing a petition for writ of certiorari with the United States Supreme Court if a notice of appeal is filed after an affirmance of the Tax Court decision by the Court of Appeals, or (3) 30 days after the Supreme Court's mandate is issued if the Tax Court decision is affirmed. *Id.* § 7481(a)(1), (2). Section 7481(a)(3) provides similar rules where the decision of the Tax Court is modified or reversed. *Id.* § 7481(a)(3).

[25] *Id.* § 6213(a). Section 7421(a), known as the "Anti-Injunction Act," generally bars the enjoining of the collection of any tax. For a discussion of section 7421(a), see notes 144 through 170 and accompanying text *infra*.

[26] I.R.C. § 6213(d).

[27] *See* Moore v. Cleveland Ry., 108 F.2d 656, 659 (6th Cir. 1940) (since waiver vitiates the statutory waiting period, assessment and collection may proceed with dispatch). *See also* United States v. Price, 361 U.S. 304, 308-09 (1960) (immediate assessment and collection subsequent to waiver protects taxpayer against continued running of interest).

[28] *See generally* Roberts, *Laing Down a Challenge: The Future of Due Process and Tax Collections*, 11 GONZAGA L. REV. 369, 371 (1976).

the government, the IRS may, under special circumstances, use a more harsh procedure known as the jeopardy assessment. Left intact by the Tax Reform Act of 1976, the jeopardy provision[29] empowers the Secretary, upon a belief that the assessment or collection of any deficiency will be jeopardized by delay, to assess and demand payment of the deficiency immediately.[30] This summary procedure is harsh because it does not afford the taxpayer an opportunity for a preseizure hearing.

According to the Internal Revenue Manual, three fact patterns constitute jeopardy for the purposes of a jeopardy assessment. If the taxpayer is or appears to be designing quickly to place property beyond the reach of the government, or if he appears to be designing quickly to depart from the country to conceal himself, or if his financial solvency appears to be imperiled, a jeopardy assessment may be made against him.[31] A jeopardy assessment may be made, however, only after the due date of the return and after a deficiency has been determined by the Treasury.[32] The District Director must personally approve recommendations for jeopardy assessments and the approved assessments must then be cleared by the Regional Office.[33]

Unlike the ordinary assessment procedure, the jeopardy procedure

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[29] I.R.C. §§ 6861-6864.

[30] *Id.* § 6861, providing for jeopardy assessment in the case of income, estate, gift, and certain excise taxes, provides in pertinent part:

> (a) Authority for Making—If the Secretary believes that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213(a) immediately assess such deficiency (together with all interest, additional amounts, and additions to the tax provided for by law), and notice and demand shall be made by the Secretary for the payment thereof.

Although § 6862 provides for jeopardy assessments in case of taxes other than income, estate, and gift taxes, the term "jeopardy assessment" is used in this Article to refer only to § 6861 assessments.

[31] [1977] 2 INTERNAL REVENUE MANUAL (CCH) ¶ 5213.21, at 8836. Other fact patterns which may also constitute jeopardy are gambling, bookmaking, financial embarrassment, and habitual indisposition to pay taxes. *See* S. Doc. No. 266, 94th Cong., 2d Sess. 504-05, 505 n.455 (1976). Congress has approved these standards as reasonable for the making of jeopardy and termination assessments. *See* S. REP. No. 938, 94th Cong., 2d Sess. 365 n.6, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 3439, 3795.

[32] A § 6861 assessment may only be made pursuant to a § 6211 deficiency. Section 6211 provides that a deficiency arises only after the taxpayer has filed his return, if he files a return. I.R.C. § 6211(a)(1)(A). If the taxpayer fails to file a return, a deficiency may arise after the due date of the return. *See generally* [1978] 24 FED. TAX COORD. 2d (R.I.A.) ¶ T-3600.1.

[33] Rev. Proc. 60-4, 1960-1 C.B. 877. The only limitation on the District Director's discretion is "that he must believe that the ultimate collection of the tax will be jeopardized by delay." Transport Mfg. & Equip. Co. v. Trainor, 382 F.2d 793, 799 (8th Cir. 1967). Furthermore, the District Director's decision is subject to narrow review by the courts. Westgage-California Corp. v. United States, 496 F.2d 839, 841 n.3 (9th Cir. 1974).

does not require that a notice of deficiency be sent to the taxpayer prior to the making of the assessment.[34] The jeopardy assessment may therefore be made regardless of whether the taxpayer has had an opportunity to file a petition for redetermination with the Tax Court.[35] Thus, under the jeopardy procedure, the taxpayer's assets may be seized before he has an opportunity for prepayment litigation.

Once a jeopardy assessment has been made a notice of deficiency entitling the taxpayer to litigate his liability in Tax Court[36] must be mailed to the taxpayer within sixty days.[37] If the taxpayer files a petition for review with the Tax Court, no further assessment may be made pending the court's decision,[38] and the final assessment may not exceed the deficiency determined by the Tax Court.[39]

C. Termination Assessments

1. Procedure and Source of Authority

Another summary procedure, the termination assessment, is available to the Treasury. The termination assessment procedure,[40] unlike the jeopardy procedure, does not require the Secretary to wait until after the due date of the taxpayer's return before assessing the taxpayer's

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[34] I.R.C. § 6861(b) requires only that a notice of deficiency under § 6212(a) be sent to the taxpayer within 60 days after the making of the assessment. *See* Communist Party, U.S.A. v. Maysey, 141 F. Supp. 332, 336 (S.D.N.Y. 1956) (construing § 6861(b)).

[35] I.R.C. § 6861(c) provides:

> The jeopardy assessment may be made . . . whether or not the taxpayer has theretofore filed a petition with the Tax Court. . . . The Secretary or his delegate shall notify the Tax Court of the amount of such assessment . . . and the Tax Court shall have jurisdiction to redetermine the entire amount of the deficiency and of all amounts assessed at the same time in connection therewith.

[36] See note 22 and accompanying text *supra*.

[37] I.R.C. § 6861(b). It should be noted that when a jeopardy assessment is made at least two notices must be sent to the taxpayer. A § 6212(a) notice of deficiency, entitling the taxpayer to Tax Court litigation, is called for in § 6861(b). A simple notice and demand for payment pursuant to § 6303(a), which has no jurisdictional ramifications, is called for in § 6861(a). *See* United States v. Ball, 326 F.2d 898, 901 (4th Cir. 1964) (construing the respective statutes).

A § 6861 jeopardy assessment may be made in an amount in excess of the amount shown on any notice of deficiency previously sent to the taxpayer. In fact, § 6861(c) specifically overrides the prohibition on the determination of additional deficiencies subsequent to the mailing of the initial notice of deficiency contained in § 6212(c).

[38] I.R.C. § 6861(e).

[39] *See id.* § 6861(d) (the jeopardy assessment is made in respect of the deficiency determined by the Tax Court). "If the amount of the jeopardy assessment is in excess of the amount determined by the Tax Court, the unpaid portion of such excess will be abated. If any part of the excess amount has been paid, it will be credited or refunded . . . ." Treas. Reg. § 301.6861-1(d) (1958).

[40] I.R.C. § 6851.

liability.[41] The Secretary may, under the termination provision, make an immediate determination of the taxpayer's liability for the current or preceding taxable year, or both, and the tax will become immediately due and payable.[42] A termination assessment may be made when the taxpayer designs to leave the country or to remove his property from it, to conceal himself or his property within the country, or to do any other act which would render proceedings to collect the tax ineffective.[43]

Prior to *Laing v. United States*[44] there was a conflict in decisions concerning the proper source of authority for termination assessments. The Second Circuit in *Irving v. Gray*[45] adopted the position that a termination assessment did not constitute a deficiency within the meaning of the jeopardy provision.[46] According to this theory, the general assessment provision[47] rather than the jeopardy provision was the proper source of authority for a termination assessment.[48] Consequently, no statutory notice of deficiency was required for a termination assessment and the taxpayer had no recourse other than to pay the assessed tax and sue for a refund.[49]

The Fifth Circuit, however, disagreed with the reasoning of *Irving*. Arguing that the general assessment provision applies only to uncontested assessments, the Fifth Circuit held in *Clark v. Campbell*[50] that the jeopardy assessment provision was the source of authority for a termination assessment.[51] Obviously more favorable to the taxpayer, this ruling incorporated the statutory notice of deficiency requirement of the jeopardy provision into the termination provision.[52] This statutory

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[41] *Compare id.* § 6851(a) *with id.* § 6861(a). In making a termination assessment the IRS may react when the requisite factual criteria exist, notwithstanding that the taxable year has not ended. *See id.* § 6851(a).

[42] *Id.* § 6851(a).

[43] *Id.* For example, the liquidation of assets by a corporation is considered grounds for a termination assessment. *Id.*

[44] 423 U.S. 161 (1976).

[45] 479 F.2d 20 (2d Cir. 1973).

[46] *Id.* at 24.

[47] I.R.C. § 6201.

[48] 479 F.2d at 24; *accord,* Parrish v. Daly, 350 F. Supp. 735, 736 (S.D. Ind. 1972) (amount of tax determined for a taxable period that has been terminated under § 6851 is not a deficiency).

[49] *See* 479 F.2d at 24 (an assessment under § 6201(a) pursuant to § 6851(a) is not a deficiency and no statutory notice of deficiency under § 6213(a) is required); Williamson v. United States, 31 A.F.T.R.2d 73-800, 73-800 (7th Cir. 1971) (deficiency notice is not required under § 6851 because the assessment is not a deficiency). Without a notice of deficiency the taxpayer is denied a Tax Court redetermination. See note 22 and accompanying text *supra.*

[50] 501 F.2d 108 (5th Cir. 1974), *cert. denied,* 423 U.S. 1091 (1976).

[51] 501 F.2d at 121-22.

[52] *Id.*; *accord,* Rambo v. United States, 492 F.2d 1060, 1064 (6th Cir. 1974) (procedural requirements of § 6861 and § 6863 are meant to apply where taxable year is termi-

construction was adopted by the Supreme Court in the companion cases of *Laing v. United States* and *United States v. Hall.*[53]

In *Laing,* the taxpayer, a citizen of New Zealand, entered the United States from Canada on a temporary visitor's visa. Attempting to return to Canada, Laing and his two companions were refused admittance. They were then detained by United States customs officers who, upon searching their car, found a large amount of money in a suitcase hidden in the car's engine compartment.[54] The District Director, upon finding that Laing was engaged in the process of placing assets beyond the reach of the government, immediately terminated Laing's taxable year and assessed a deficiency.[55] Although demand for payment was made by the District Director, Laing did not receive a notice of deficiency or any specific information indicating how the amount of the assessment was determined.[56] When Laing refused to pay the assessed tax, the Internal Revenue Service seized the currency found in his car and applied a portion of it in satisfaction of the assessed tax.[57]

In *United States v. Hall,*[58] Kentucky state troopers acting under authority of a search warrant[59] discovered controlled substances in the home of Mrs. Hall. The following day the District Director informed her that he had found her involvement in illicit drug activities prejudiced the collection of her income tax.[60] He then terminated her taxable year, assessed a tax, and made immediate demand for payment of the full amount.[61] Mrs. Hall, like Mr. Laing, received no notice of deficiency, nor was she told how the amount of the tax was determined.[62] Since she was financially unable to pay the tax, the Internal Revenue Service seized her car and offered it for sale.[63]

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nated under § 6851), *cert. denied,* 423 U.S. 1091 (1976); Schreck v. United States, 301 F. Supp. 1265, 1284 (D. Md. 1969) (section 6861 allows government to terminate taxable year but does not confer independent assessment authority).

[53] 423 U.S. 161 (1976).

[54] Over $300,000 was in the hidden suitcase. *Id.* at 165.

[55] The District Director terminated the taxable year of each of the three men under § 6851(a) and orally assessed a tax of $310,000 against each of them, though Mr. Laing's assessment was later abated to $195,985.55. *Id.*

[56] *Id.*

[57] *Id.* at 165-66. Laing did not deny ownership of the currency. *Id.* at 166 n.5.

[58] 423 U.S. 161 (1976).

[59] The troopers had obtained the warrant after the arrest of Mrs. Hall's husband on drug-related charges in Texas. *Id.* at 167.

[60] *Id.*

[61] The District Director terminated her taxable year under § 6851 and assessed a tax of $52,680.25 against her. *Id.*

[62] *Id.* at 168.

[63] The Service offered her Volkswagen for sale pursuant to § 6331. *Id.* At the time of the suit, the prohibition on sale of seized property in § 6863(b)(3)(A) did not apply to termination assessments.

Without reaching the due process issue,[64] the Supreme Court held that since a termination assessment results in a tax that is both owing and unreported, such an assessment constitutes a deficiency within the meaning of section 6211(a) of the Internal Revenue Code.[65] The Court reasoned that since the section 6211(a) definition of deficiency is used in the jeopardy assessment provision, the procedural safeguards applicable to jeopardy assessments were equally applicable to termination assessments.[66] Consequently, the taxpayers should have been sent notices of deficiency within sixty days of the termination assessments to preserve their right to a redetermination of the deficiency by the Tax Court.[67] Assessment and collection of the taxes were therefore enjoined in both *Laing* and *Hall,* despite the Anti-Injunction Act.[68]

2. The Tax Reform Act

The Tax Reform Act of 1976 made several changes in the termination assessment procedure.[69] Under prior law, the decision of whether to

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[64] Rejecting the government's reading of the Code, the Court found it unnecessary to decide whether the procedure under the government's theory was constitutional. 423 U.S. at 183 & n.26.

[65] *Id.* at 175.

[66] *Id.* at 184.

[67] *Id.* This requirement is drawn from § 6861(b).

[68] 423 U.S. at 184. Though the Anti-Injunction Act bars any suit to enjoin assessment or collection of taxes, I.R.C. § 7421(a), if a jeopardy assessment under § 6861 or, by virtue of *Laing*, a termination assessment under § 6851 prior to the Tax Reform Act of 1976 did not comply with the procedural safeguards of § 6861, a suit to enjoin assessment and collection of the tax could be maintained under the exception to the Anti-Injunction Act contained in § 6213(a). For further discussion of the Anti-Injunction Act, see notes 127 through 143 and accompanying text *infra*.

[69] I.R.C. § 6851 was amended substantially by the Tax Reform Act of 1976 and now provides as follows:

> (a) Authority for making—
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> (1) In general—If the Secretary finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act (including in the case of a corporation distributing all or a part of its assets in liquidation or otherwise) tending to prejudice or to render wholly or partially ineffectual proceedings to collect the income tax for the current or the immediately preceding taxable year unless such proceeding be brought without delay, the Secretary shall immediately make a determination of tax for the current taxable year or for the preceding taxable year, or both, as the case may be, and notwithstanding any other provision of law, such tax shall become immediately due and payable. The Secretary shall immediately assess the amount of the tax so determined (together with all interest, additional amounts, and additions to the tax provided by law) for the current taxable year or such preceding taxable year, or both, as the case may be, and shall cause notice of such determination and assessment

make a termination assessment rested with "the Secretary or his delegate." The amended statute, however, grants this authority only to the Secretary.[70] Notwithstanding this statutory change, in view of the obvious practical difficulties involved in having the Secretary pass upon the propriety of every termination assessment, the final decision will most likely rest, as it did under prior law, with the District Director.[71]

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to be given the taxpayer, together with a demand for immediate payment of such tax.

. . . .

(b) Notice of deficiency—If an assessment of tax is made under the authority of subsection (a), the Secretary shall mail a notice under section 6212(a) for the taxpayer's full taxable year (determined without regard to any action taken under subsection (a)) with respect to which such assessment was made within 60 days after the later of (i) the due date of the taxpayer's return for such taxable year (determined with regard to any extensions), or (ii) the date such taxpayer files such return. Such deficiency may be in an amount greater or less than the amount assessed under subsection (a).

. . . .

(e) Sections 6861(f) and (g) to apply—The provisions of section 6861(f) (relating to collection of unpaid amounts) and 6861(g) (relating to abatement if jeopardy does not exist) shall apply with respect to any assessment made under subsection (a).

Prior to amendment, § 6851 read as follows:

(a) Income tax in jeopardy—

(1) In general—If the Secretary or his delegate finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect the income tax for the current or the preceding taxable year unless such proceedings be brought without delay, the Secretary or his delegate shall declare the taxable period for such taxpayer immediately terminated, and shall cause notice of such finding and declaration to be given the taxpayer, together with a demand for immediate payment of the tax for the taxable period so declared terminated and of the tax for the preceding taxable year or so much of such tax as is unpaid, whether or not the time otherwise allowed by law for filing return and paying the tax has expired; and such taxes shall thereupon become immediately due and payable. In any proceeding in court brought to enforce payment of taxes made due and payable by virtue of the provisions of this section, the finding of the Secretary or his delegate, made as herein provided whether made after notice to the taxpayer or not, shall be for all purposes presumptive evidence of jeopardy.

Int. Rev. Code of 1954, ch. 70, § 6851(a)(1), 68A Stat. 833 (amended 1976).

For a discussion of the law prior to the Tax Reform Act of 1976, see Shapiro & Briskin, *Supreme Court Opens the Door to Tax Court Review of Jeopardy Terminations*, 44 J. TAX 194 (1976); Note, *Section 6851 Termination of a Taxable Year: The Search for a Taxpayer Remedy*, 24 DRAKE L. REV. 683 (1975); Note, *Jeopardy Assessment: The Sovereign's Stranglehold*, 55 GEO. L.J. 701 (1967); Note, *Jeopardy Terminations Under Section 6851: The Taxpayer's Rights and Remedies*, 60 IOWA L. REV. 644 (1975).

[70] I.R.C. § 6851(a)(1).

[71] Under Treas. Reg. § 1.6851-1(a)(1) (1959) the District Director was vested with

In addition, the statutory language which created a presumption of jeopardy solely on the basis of the District Director's determination that jeopardy exists has been dropped from the termination provision.[72] Most importantly, the termination provision now provides that a notice of deficiency must be sent to the taxpayer against whom a termination assessment is made.[73] However, because of a significant procedural discrepancy in the operation of the deficiency notice procedure under the jeopardy and termination provisions, the termination deficiency notice may prove to be less beneficial to the taxpayer than the jeopardy notice.[74]

These changes substantially increase the protection afforded the taxpayer under the termination procedure. There may, however, be lingering doubt over whether the protection provided by the changes is sufficient to satisfy the requirements of due process.

II. The Due Process Requirements

Both the jeopardy and termination assessment procedures present questions involving due process—(1) whether seizure of the taxpayer's assets without a preseizure hearing violates the requirements of procedural due process, and (2) whether, if no preseizure hearing is required, an immediate postseizure hearing is required. In resolving claimed violations of procedural due process, the Supreme Court has often employed a balancing test, weighing the respective interests of the parties.[75] Thus, a determination of the constitutionality of the jeopardy and ter-

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discretionary authority to make termination assessments. Although the amended statute does not expressly grant the authority to make termination assessments to the Secretary's delegate, a proposed regulation will return this authority to the District Director. [1978] 8 Fed. Taxes (P-H) ¶ 53,261. The policy considerations governing the making of a termination assessment are as follows, according to one commentator: (1) the power to terminate the taxable year must be used sparingly and care must be taken in order to avoid excessive and unreasonable assessments; (2) if the taxpayer is in a position such that termination and assessment might cause serious inconvenience to the general public, a termination must have prior approval of the Director of the Audit Division in the national office; and (3) all decisions to use § 6851 must be reviewed by the regional office and selected cases are reviewed by the national office. *See* Note, *Jeopardy Terminations Under Section 6851: The Taxpayer's Rights and Remedies*, *supra* note 69, at 646-48 (drawn from policy limitations espoused by the Service).

[72] I.R.C. § 6851(a). Under prior law "the finding of the Secretary or his delegate . . . shall be for all purposes presumptive evidence of jeopardy." Int. Rev. Code of 1954, ch. 70, § 6851(a)(1), 68A Stat. 833 (language deleted 1976).

[73] I.R.C. § 6851(b). This added safeguard may not prove to be as effective in protecting the taxpayer under the termination procedure as it is under the jeopardy procedure. See notes 118 through 124 and accompanying text *infra*.

[74] See notes 120 through 122 and accompanying text *infra*.

[75] *See* Commissioner v. Shapiro, 424 U.S. 614, 630 n.12 (1976) (citing Goss v. Lopez, 419 U.S. 565, 579 (1975)).

mination assessment procedures requires a balancing of the governmental interest in the collection of internal revenue against the taxpayer's interest in procedural safeguards.

Phillips v. Commissioner[76] has often been cited as determinative of the constitutionality of the summary seizure provisions of the Internal Revenue Code.[77] In *Phillips,* a stockholder of a liquidated corporation was held liable as a transferee of the corporation for federal income and profits taxes.[78] The taxpayer argued that the summary procedures permitted by the predecessor of the present sections on transferee liability[79] were unconstitutional since they did not provide for a preseizure judicial determination of liability.[80] Rejecting the taxpayer's argument, the Court held that "where only property rights are involved, the mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate."[81]

The rationale behind the Court's holding was that since the procedure on transferee liability provided the taxpayer with a postseizure opportunity to litigate his liability in either the district court or the Tax Court, the due process requirements had been met.[82]

In recent years, the Supreme Court has upon numerous occasions discussed the due process issues raised by the seizure of property in cases involving disputes between debtors and private creditors. In *Sniadach v. Family Finance Corp.*,[83] the Supreme Court held that wages are a specialized type of property which cannot be seized unless the debtor is afforded a pregarnishment hearing.[84] The reasoning of

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[76] 283 U.S. 589 (1931).

[77] *See* Dyer v. Gallagher, 203 F.2d 477, 478-79 (6th Cir. 1953) (jeopardy assessment constitutional, citing *Phillips*); Harvey v. Early, 160 F.2d 836, 838 (4th Cir. 1947) (same); Continental Prod. Co. v. Commissioner, 66 F.2d 434, 436 (1st Cir. 1933) (principles espoused in *Phillips* also cover jeopardy assessments of income taxes); Matthews v. United States, 33 A.F.T.R.2d 74-1038, 74-1039 (S.D. Tex. 1974) (noting that Supreme Court has not retreated from *Phillips*); Universal Life Church v. United States, 72-1 U.S. Tax Cas. 84,619 at 84,620 (validated summary procedure on ground that only Supreme Court can overrule *Phillips*).

See generally Roberts, *supra* note 28, at 385; Rosenthal, *Jeopardy and Termination Assessments After Laing and Hall: Jeopardizing the Fourth Amendment,* 31 TAX L. REV. 317, 341 (1976); Note, *Termination of the Taxable Year: The Need for Timely Judicial Review,* 48 S. CALIF. L. REV. 184, 197 (1974).

[78] 283 U.S. at 592.

[79] Int. Rev. Code of 1926, ch. 1, § 280(a)(1), 44 Stat. 9 (now I.R.C. §§ 6901-6905).

[80] 283 U.S. at 593-94.

[81] *Id.* at 596-97. The Court noted that "the right of the United States to collect its internal revenue by summary administrative proceedings has long been settled." *Id.* at 595.

[82] *Id.* at 597-98. *See* Note, *supra* note 77, at 198-202.

[83] 395 U.S. 337 (1969), *noted in* 83 HARV. L. REV. 113 (1969).

[84] 395 U.S. at 340. In *Sniadach* the Court held unconstitutional a Wisconsin garnish-

Sniadach was extended beyond "specialized" property in *Fuentes v. Shevin*,[85] and was applied to invalidate two replevin statutes that allowed seizure of property without a hearing.[86] The impact of *Fuentes* was, however, diminished when the Supreme Court, in *Mitchell v. W.T. Grant Co.*,[87] held that no denial of due process exists if the debtor whose property is seized is granted an immediate postseizure hearing.[88]

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ment statute which allowed the court clerk, upon request of the creditor's attorney, to issue a summons freezing the garnishee's wages. *Id.* at 342. The statute provided that the wages could be freed after a trial on the merits if the garnishee prevailed. The Court held that since the garnishee could as a practical matter suffer a tremendous hardship in the interim period because he would be deprived of the use and enjoyment of the wages, and since the garnishee was not afforded an opportunity under the statutory scheme to raise any defenses he might have, *id.* at 339, the statutory procedure violated the fundamental principles of due process. *Id.* at 342. Although the *Sniadach* opinion is brief and ambiguous, it clearly holds that wages are a specialized type of property, *id.* at 340, and are an exception to the general rule that no preseizure notice and hearing is required if the debtor is afforded an opportunity for a judicial determination on the merits at some point in time. The Court focused in *Sniadach* on the fact that "the result is that a prejudgment garnishment statute of the Wisconsin type may as a practical matter drive a wage-earning family to the wall." *Id.* at 341-42.

Sniadach was the first venture of the Supreme Court into the sphere of prejudgment creditor remedies in over 40 years. Roberts, *supra* note 28, at 388. Prior to *Sniadach*, the Supreme Court had based its due process analysis on whether the debtor had his day in court rather than on when that day was held. If the debtor was afforded an opportunity for an ultimate judicial determination on the merits, the Court consistently sustained prejudgment seizure of property by attachment against due process challenges. *See generally* Phillips v. Commissioner, 283 U.S. 589, 595-97 (1931); Coffin Bros. & Co. v. Bennett, 277 U.S. 29, 31 (1928) (due process not denied when given a reasonable opportunity to be heard and present a defense).

[85] 407 U.S. 67 (1972).

[86] *Id.* at 96. The statutes involved permitted a private party, with no prejudgment hearing or notice to the debtor, to obtain a writ of replevin from the court clerk through an ex parte application and the posting of a bond. Under both statutes, the debtor could reclaim his property by posting a counter-bond, *id.* at 75, though in Pennsylvania the debtor was required to institute suit to obtain a judicial hearing on the merits. *Id.* at 78. Focusing on the need for a hearing at a meaningful time, the Court held the statute unconstitutional, arguing that the posting of bond is no substitute for an informed evaluation by a neutral official. *Id.* at 83. *Fuentes* extended the due process clause protection against seizure of property without notice and hearing from the taking of the specialized type of property in *Sniadach*, to any "significant" taking of property. *Id.* at 86. The Court recognized, however, that "extraordinary situations" which are "truly unusual" might justify the postponing of notice and hearing prior to seizure. *Id.* at 90. See note 90 *infra*.

[87] 416 U.S. 600 (1974).

[88] *Id.* at 617-18. Under the Louisiana sequestration statute involved in *Mitchell*, a secured creditor was entitled, upon the filing of an affidavit and bond, to a writ of sequestration to sequester the property in which a security interest was claimed. *Id.* at 605-07, 618. The writ of sequestration had to be approved by a judicial officer, and the debtor was entitled to immediate dissolution of the writ unless the creditor could prove the grounds upon which it was issued. *Id.* at 606-07.

Rejecting a due process challenge to the sequestration statute, the Court cited *Phillips*

for the proposition that mere postponement of judicial inquiry is not a denial of due process where only property rights are concerned. *Id.* at 611. Noting that the writ was issuable only by a judge, *id.* at 616, and that the debtor could regain possession either by filing his own bond or by demonstrating at an immediate hearing that the repossession was unjustified, *id.* at 618, the Court distinguished *Sniadach* and *Fuentes* on the grounds that they apply only in cases of final deprivation of property, and have no application where, as in *Mitchell,* a full and immediate post-termination hearing is provided. *Id.* at 617-18. The Court did not, however, address whether the *Mitchell* ruling applies only to secured transactions.

In its most recent venture into the debtor-creditor due process field, the Court in North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975), *noted in* 46 MISS. L.J. 1104 (1975), held a Georgia garnishment statute unconstitutional, finding the statute to be lacking in the saving characteristics of the statute involved in *Mitchell.* 419 U.S. at 607. Under the Georgia procedure a creditor was entitled to a writ of garnishment by making an affidavit before a nonjudicial officer and posting a bond equal to double the amount sworn to be due. *Id.* at 602-03. Though failing to address the weight of the various factors considered pertinent under *Mitchell,* the Court noted that the Georgia statute did not provide for an early hearing requiring the creditor to show at least probable cause for the garnishment, nor did it provide the debtor with an alternative method, besides posting bond, for challenging the garnishment. *Id.* at 607.

The tendency of the Supreme Court to treat prehearing seizure issues on a case-by-case basis makes it difficult to establish any definite criteria against which the validity of a given prehearing seizure remedy may be measured. Common threads do, however, appear in the cases. For a prejudgment seizure remedy to be held constitutional, it seems that the facts underlying the seizure must be presented to a judicial officer who must then pass upon the probable cause of the affidavit; a postseizure hearing requiring the creditor to present the grounds for the seizure and all issues relevant to its continuance must be provided at the first opportunity after the ex parte seizure; the creditor must institute suit on the underlying debt; and the debtor must have an unconditional right to challenge the seizure. *See generally* Roberts, *supra* note 28, at 392-93.

The current cases do not focus on the "extraordinary situations," mentioned in *Fuentes,* when a postseizure hearing might be adequate. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974), sheds a bit more light on this issue. In that case a leased pleasure yacht laden with marijuana was seized pursuant to Puerto Rican statutes providing for forfeiture of vessels used for unlawful purposes. Appellee leasing company was given no notice and was neither involved in nor aware of the lessee's illegal use of the yacht. The Supreme Court held the statutory scheme constitutional, though the statute did not provide for bond, for an evidentiary basis for the seizure, or for judicial participation. The extraordinary considerations present were: (1) the seizure served a significant governmental purpose since it permitted Puerto Rico to acquire in rem jurisdiction over the property in order to conduct forfeiture proceedings; (2) preseizure notice and hearing might frustrate the purpose of the statute since the property could be readily concealed or removed from the jurisdiction if advance warning were given; and (3) seizure was initiated by Puerto Rican officials, rather than by self-interested private parties such as those in *Fuentes. Id.* at 679.

Prior to the Tax Reform Act, the jeopardy and termination assessment provisions were attacked as unconstitutional on both equal protection, *see* Note, *Jeopardy Terminations Under Section 6851: The Taxpayer's Rights and Remedies, supra* note 69, at 669-70, and fourth amendment grounds, Rosenthal, *supra* note 77, at 344-54.

The equal protection argument was based on the proposition that termination assessments resulting in a short taxable year discriminated against taxpayers since the taxpayers were not entitled to a notice of deficiency and were thus deprived of the right to prepayment litigation in the Tax Court. In effect, the equal protection argument was that

Though these cases involved disputes between debtors and private creditors, the Court has intimated that they do not form a separate body of law apart from tax cases such as *Phillips*. Indeed, in *Commissioner v. Shapiro*[89] the Court stated that the holding in *Phillips* "appears to be entirely consistent with our more recent holdings."[90] Stressing that the dicta in *Phillips* clearly requires an adequate opportunity for an ultimate judicial determination of liability,[91] the *Shapiro* Court concluded that *Phillips* does not allow the tax collector to seize assets of the taxpayer without some showing of the basis for the seizure if irreparable harm would result.[92] Thus, when summary seizure of the taxpayer's assets would cause irreparable injury, the due process right of the tax-

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termination assessments should not be treated differently from regular jeopardy assessments and taxpayers subject to termination assessments should therefore not be deprived of the procedural safeguards provided under § 6861. This argument was accepted by no court and does not appear viable under the current procedure.

The fourth amendment argument, advanced by Rosenthal, was premised on the fact that the fourth amendment applies to noninvestigatory seizures and that a summary assessment and seizure conducted without the consent of a neutral detached magistrate is an unreasonable seizure within the meaning of the fourth amendment. Rosenthal, *supra* note 77, at 345. The author therein points out that the governmental need to collect taxes through the use of summary assessments is certainly no greater than the need to prevent crime; therefore, the law applicable to forfeiture proceedings should apply with like force to summary seizures. The author concludes that since the fourth amendment prohibits unreasonable seizures, the prior procedures were subject to constitutional attack since no probable cause for the assessment and seizure was required. This argument, although not adopted by any court, appears equally viable under the current summary assessment provisions.

[89] 424 U.S. 614 (1976).

[90] *Id.* at 632. In Fuentes v. Shevin, 407 U.S. 67 (1962), instead of stating that the constitutionality of the summary tax procedure involved issues distinct from those presented in *Fuentes*, the Court simply excluded the summary tax procedures from the due process guidelines outlined in *Fuentes* by referring to the government's need to collect taxes as an "extraordinary situation". *Id.* at 91-92. Furthermore, the *Fuentes* Court quoted Phillips v. Commissioner, 283 U.S. 589, 597 (1931) for the proposition that "'[D]elay is the judicial determination of property rights is not uncommon where it is essential that governmental needs be immediately satisfied.'" 407 U.S. at 92 n.24.

The Court has allowed summary seizure of property by the government for reasons other than the collection of internal revenue. *See* Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 599-600 (1950) (protection of the public from misbranded drugs); Fahey v. Mallonee, 332 U.S. 245, 253-54 (1947) (bank failure); United States v. Pfitsch, 256 U.S. 547, 549-50 (1921) (national war); North Am. Cold Storage Co. v. Chicago, 211 U.S. 306, 320 (1908) (protection of the public from contaminated food). The *Fuentes* Court noted, however, that in such "extraordinary situations" the government has had an important interest to protect through quick action and has controlled its exercise of force. 407 U.S. at 91-92.

[91] 424 U.S. at 631.

[92] *Id.* Employing the balancing test, the Court continued: "[I]t is very doubtful that the need to collect the revenues is sufficient to justify seizure causing irreparable injury without a prompt post-seizure inquiry." *Id.* at 630 n.12.

payer to a prompt postseizure hearing outweighs, under *Shapiro,* the governmental interest in the collection of revenues. The Court concluded in forceful language, however, that preseizure hearing is not required before seizure of a taxpayer's assets.[93]

The *Shapiro* Court never directly confronted the constitutionality, under the due process clause, of the procedure.[94] Instead, the Court dealt with the procedure by reference to the Anti-Injunction Act.[95] The Court's decision resulted in Congressional action to ensure the government's power to collect revenue through summary proceedings.[96] Section 7429 of the Tax Reform Act of 1976, passed by Congress in response to *Shapiro,* provides a forum for the taxpayer to contest immediately the propriety of a summary assessment against him. In conjunction with the amended section 6851, which requires a notice of deficiency in a termination assessment, section 7429 enhances the level of procedural protection provided for a taxpayer subjected to a summary assessment. Before the procedural effects of the new sections can be examined, however, the safeguards available to the taxpayer prior to the Tax Reform Act must be examined to provide some insight into the basis of the necessity for reform.

III. Procedural Safeguards of Summary Assessments

A. Bond

Collection of a jeopardy or termination assessment may be stayed if the taxpayer files a bond conditioned on payment of the assessed amount.[97] This "remedy" fails, however, to moderate the harsh results of the summary assessment for several reasons. A taxpayer with sufficient assets to post bond will generally not be the subject of a jeopardy assessment.[98] Additionally, the Internal Revenue Service can frustrate the taxpayer's ability to post bond either by depleting his resources through seizure of his assets, or by seizing his property pursuant to a large assessment thereby depriving him of the collateral needed to obtain a commercial bond.[99] Finally, in practice, acceptance of a bond is

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[93] *Id.* at 630 n.12.

[94] See notes 139 through 143 and accompanying text *infra.*

[95] See notes 136 through 143 and accompanying text *infra.*

[96] *See* S. Rep. No. 938, *supra* note 31, at 363-64, U.S. Code Cong. & Ad. News at 3793.

[97] I.R.C. § 6863 (a).

[98] *See* Gould, *Jeopardy Assessments: When They May Be Levied and What to Do About Them,* 18 N.Y.U. Inst. on Fed. Tax. 937, 944-45 (1960); *cf.* 114 Cong. Rec. 1833 (1968) (remarks of Rep. Gonzales), *quoted in* Sniadach v. Family Fin. Corp., 395 U.S. 337, 342 n.9 (1969) (effect of attachment of wages).

[99] *See* Clark v. Campbell, 501 F.2d 108, 123 (5th Cir. 1974) (once assets are seized it is practically impossible to obtain a bond), *cert. denied,* 423 U.S. 1091 (1976). *See generally* Rosenthal, *supra* note 77, at 330-31.

discretionary with the District Director.[100] Indeed, because of the effective barriers to its use, the bond remedy has been branded as totally illusory.[101]

B. Abatement

At the taxpayer's request the Secretary may abate a jeopardy[102] or termination assessment[103] in whole or in part if jeopardy does not in fact exist. Since the power of abatement is delegated to the District Director—the same official who must review the initial propriety of the jeopardy assessment—the power of abatement is rarely successfully invoked.[104] In addition, the decision to abate an initial assessment may be

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[100] I.R.C. § 6863(a) provides that the bond must be posted "within such time as may be fixed by regulations." Treas. Reg. § 301.6863-1(a)(2) (1975) provides:

> The bond may be filed—
>
> (i) At any time before the time collection by levy is authorized under section 6331(a), or
>
> (ii) After collection by levy is authorized and before levy is made on any property or rights to property, or
>
> (iii) In the discretion of the district director, after any such levy has been made and before the expiration of the period of limitations on collection.

It appears that since the § 6331(a) 10 day waiting period for levy does not apply to jeopardy and termination assessments, *see* I.R.C. § 6331(a), the taxpayer's right to file a bond is almost always subject to the discretion of the District Director. *See generally* Note, *Jeopardy Assessment: The Sovereign's Stranglehold, supra* note 69, at 705 n.28.

[101] Clark v. Campbell, 501 F.2d 108, 123 (5th Cir. 1974), *cert. denied,* 423 U.S. 1091 (1976); *see* Schreck v. United States, 301 F. Supp. 1265, 1279 (D. Md. 1969) (right to bond is illusory unless taxpayer has assets which exceed the amount assessed); Kimmel v. Tomlinson, 151 F. Supp. 901, 902 (S.D. Fla. 1957) (after a taxpayer has been stripped of all his assets the right to bond is a mockery). *See generally* Gould, *supra* note 98, at 944; Rosenthal, *supra* note 77, at 331 n.68; Tarlow, *supra* note 6, at 1197; Note, *Jeopardy Assessment: The Sovereign's Stranglehold, supra* note 69, at 705.

[102] I.R.C. § 6861(g).

[103] *Id.* § 6851(e) adopts the abatement procedure of § 6861(g). An abatement may not be rendered subsequent to a Tax Court determination of tax liability. Durovic v. Commissioner, 487 F.2d 36, 40 (7th Cir. 1973), *cert. denied,* 417 U.S. 919 (1974).

[104] *See* Clark v. Campbell, 501 F.2d 108, 124 (5th Cir. 1974) (abatement offers limited protection), *cert. denied,* 423 U.S. 1091 (1976). There will be no abatement unless the District Director is persuaded by the taxpayer that a mistake has been made. 501 F.2d at 124. *See generally* Rev. Proc. 60-4, 1960-1 C.B. 879 (requests are personally considered by the District Director and final action is reviewed by the Regional Office).

Treas. Reg. § 301.6861-1(f)(3) (1961) provides only that:

> (3) Request for abatement of a jeopardy assessment, because jeopardy does not exist, shall be filed with the district director, shall state fully the reasons for the request, and shall be supported by such evidence as will enable the district director to determine that the collection of the deficiency is not in jeopardy.

It has been held that the principles governing the District Director's imposition of a summary assessment should also govern his refusal to abate. *See* Transport Mfg. & Equip. Co. v. Trainor, 382 F.2d 793, 799 (8th Cir. 1967). Furthermore, unless there is some

made after the taxpayer has been deprived of the use of his property. If the seizure of property has caused irreparable harm, an abatement could not then rectify the damage. Given this dilemma, abatement seems also to be a somewhat less than adequate remedy for the taxpayer.

C. *Suit for Refund*

Assuming the taxpayer has met the condition precedent of filing a claim for refund[105] within the applicable time limit,[106] he may file a suit in the district court or Court of Claims[107] for refund of any tax he believes to have been erroneously or illegally assessed.[108] This right to sue for refund has been severely restricted, however, by the full payment rule of *Flora v. United States.*[109] *Flora* requires full payment of the entire tax deficiency as a jurisdictional prerequisite to a refund suit in district court.[110] Since the Internal Revenue Service will often assess a deficiency that is equal to or greater than the value of the property seized,[111] the full payment rule frequently proves to be a prohibitive obstacle for the taxpayer. Moreover, in certain circumstances the property seized may not be applied against the deficiency.[112] Furthermore, even if the prop-

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illegality or exceptional circumstance, the District Director's refusal to abate should not be judicially overturned. *Id.*

[105] I.R.C. § 7422(a) provides: "No suit or proceeding shall be maintained . . . for the recovery of any internal revenue tax . . . until a claim for refund or credit has been duly filed with the Secretary or his delegate . . . ." The requirement of filing a claim for refund is jurisdictional. Essex v. Vinal, 499 F.2d 226, 231 (8th Cir. 1974), *cert. denied*, 419 U.S. 1107 (1975); Lewis v. Sandler, 498 F.2d 395, 399-400 (4th Cir. 1974).

[106] The limitation period for claiming a refund is the later of three years from the date the return was filed or two years after the date the tax was paid. I.R.C. § 6511(a); *see* Schneider v. United States, 300 F. Supp. 136, 137 (S.D.N.Y. 1969) (refund claim must be filed within period of limitation).

[107] I.R.C. § 7422(e). This suit may not be brought prior to the expiration of six months from the date of filing of the claim for refund unless the claim is earlier disallowed, nor after the expiration of two years from the date of certified mailing of the notice of disallowance of the claim. *Id.* § 6532(a).

[108] *Id.* § 7422(a).

[109] 362 U.S. 145 (1960).

[110] *Id.* at 150-51. The Court's rationale was that the Tax Court is the forum for prepayment litigation, while the full tax must be paid in order to sue in other courts. *Id.* at 158-63.

[111] *See* Clark v. Campbell, 501 F.2d 108, 117 n.28 (5th Cir. 1974) (based on reported cases the IRS usually assesses a tax nearly equal to or in excess of assets), *cert. denied*, 423 U.S. 1091 (1976). See note 6 *supra.*

[112] If the seized property is the subject of a forfeiture proceeding, then, regardless of its value, the IRS may not apply it in satisfaction of the deficiency. *See* Schreck v. United States, 301 F. Supp. 1265, 1281 (D. Md. 1969). *See generally* Roberts, *supra* note 28, at 375. A seizure of property is not payment of the underlying tax. Thus, in the event the taxpayer is precluded access to the Tax Court by, for example, letting the 90 day filing period pass, he may be effectively prevented from having his day in court.

erty is applied to the deficiency assessment, the taxpayer cannot sue for refund unless the value of the property is at least equal in value to the amount of the assessment.[113]

If the taxpayer pays the tax in full and files a claim for refund, he must wait six months before filing a suit for refund.[114] This statutory waiting period, taken in conjunction with the length of time the case will remain on the court docket, can cause a substantial delay in a hearing of the claim on the merits.

D. Sale of Seized Property

The taxpayer has at least one safeguard of real import. Property seized pursuant to a jeopardy or termination assessment may not be sold until either the time for administrative and judicial review has expired,[115] the time for filing a petition in Tax Court has passed, or, if a petition has been filed, the Tax Court decision has become final.[116] Although there are exceptions to the general rule prohibiting the sale of seized property during the time provided for Tax Court litigation,[117] the exceptions seem generally to favor the taxpayer since they tend to increase the amount which will ultimately be applied against the defi-

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[113] Schreck v. United States, 301 F. Supp. 1265, 1281 (D. Md. 1969).

[114] I.R.C. § 6532(a)(1). Furthermore, the delay may be as long as three years if no notice of deficiency is sent immediately and the proceeds from the sale of the seized property are not applied to the tax owing. In effect, the Service has three years in which to audit the return and send a notice of deficiency under the normal tax collection procedure. *Id.* § 6501(a).

[115] *Id.* § 6863(b)(3) provides:

> (A) General Rule—Where, notwithstanding the provisions of section 6213(a), an assessment has been made under section 6851 or 6861, the property seized for collection of the tax shall not be sold—
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> (i) before [the day on which a district court judgment in a section 7429 review becomes final, or before expiration of the time allowed to request a section 7429 administrative review, and if such review is requested, before expiration of the time allowed for commencing a district court action].
>
> (ii) before the issuance of the notice of deficiency described in section 6851(b) or 6861(b), and the expiration of the period provided in section 6213(a) for filing a petition with the Tax Court, and
>
> (iii) if a petition is filed with the Tax Court (whether before or after the making of such assessment), before the expiration of the period during which the assessment of the deficiency would be prohibited if neither sections 6851(a) nor 6861(a) were applicable.
>
> Clauses (ii) and (iii) shall not apply in the case of a termination assessment under section 6851 if the taxpayer does not file a return for the taxable year by the due date (determined with regard to any extensions).

[116] *Id.* § 6863(b)(3)(A)(i).

[117] Seized property may be sold if: (1) the taxpayer consents to the sale; (2) the expenses of conservation and maintenance will greatly reduce the net proceeds; or (3) the seized property consists of perishable goods, etc. described in § 6336. *Id.* § 6863(b)(3)(B).

ciency. On the other hand, since a forced sale frequently does not bring fair market value, application of the proceeds of a forced sale to the deficiency may not reduce the taxpayer's assessed liability by an amount equal to the value of the property.

The importance of the prohibition on the sale of seized assets is apparent. If the taxpayer ultimately prevails in Tax Court, he will be entitled to recover the very property seized—property which may have a value to him far in excess of its fair market value.

Although the preceding safeguards are designed to alleviate the hardship caused to the taxpayer by a summary assessment, they have one common failure. None of them provides a taxpayer who has limited resources with a realistic opportunity to contest the assessment prior to having his property seized. This potential for abuse inherent in the summary assessment procedures gave rise, judicially and then legislatively, to new safeguards intended to increase the protection afforded the taxpayer and avoid possible due process conflicts in the summary procedures. These new provisions, adopted in the Tax Reform Act of 1976, are discussed and analyzed below.

E. The New Provisions

1. Section 6851 Under the Tax Reform Act of 1976

In response to *Laing v. United States,*[118] Congress, in the Tax Reform Act of 1976, incorporated the statutory notice of deficiency requirement of the jeopardy procedure into the termination procedure.[119] There is, however, an important difference in its application under the two procedures. Under the termination procedure, the notice of deficiency must be sent to the taxpayer within sixty days after the later of the due date of the return for the taxable year in which the termination assessment is made, or the date the taxpayer files his return.[120] However, a termination assessment under the amended statute no longer ends the taxable year; the year is closed merely for the purpose of computing the amount to be assessed.[121] Thus, although the statutory notice of defi-

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[118] 423 U.S. 161 (1976).

[119] I.R.C. § 6851(b).

[120] *Id.*

[121] *Id.* § 6851(a). The Congressional purposes in providing for the close of a taxpayer's taxable year for computational purposes only were two-fold: multiple short taxable years could create administrative problems for the Internal Revenue Service, and multiple short years could result in a detriment to the taxpayer. S. REP. NO. 938, *supra* note 31, at 366-67, U.S. CODE CONG. & AD. NEWS at 3796.

The effect of this procedure is to treat amounts assessed and collected under a termination assessment in a manner similar to the treatment given estimated taxes. *Id.* at 367, U.S. CODE CONG. & AD. NEWS at 3796. Such a collection does not have the effect of

ciency entitles the taxpayer to Tax Court litigation, there could conceivably be a lapse of seventeen months between the making of the assessment and the time the taxpayer receives the notice of deficiency.[122]

Under both the jeopardy and termination assessment procedures if the taxpayer refuses to pay the assessed amount upon demand for payment, the IRS may commence levy upon his property without regard to the normal ten days' notice-before-levy requirement.[123] Thus, the IRS may make a jeopardy or termination assessment, demand payment, and seize the taxpayer's assets at virtually the same time. In fact, the taxpayer may not even have a chance to pay the assessed amount voluntarily before his assets are seized.[124] The taxpayer is therefore afforded no opportunity for preseizure hearing under either procedure. Section 7429, however, provides for a prompt postseizure review of summary assessments.

2. Section 7429 Review

A classic example of legislative response to judicial action, section 7429 provides for administrative and judicial review of the propriety of jeopardy and termination assessments.[125] Established by Congress in

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terminating the taxpayer's taxable year; rather, the taxable year continues until its normal end. *Id.*, U.S. CODE CONG. & AD. NEWS at 3796.

[122] *See* I.R.C. § 6851(b). A calendar year taxpayer subjected to a termination assessment in the month of January would not be entitled to a notice of deficiency until June 14 of the following year.

[123] *Id.* § 6331(a). Levy means "the power of distraint and seizure by any means." *Id.* § 6331(b).

[124] The anomalous situation of the willing taxpayer's being denied the opportunity to pay the assessed tax prior to seizure occurred under prior law, see Note, *Jeopardy Terminations Under Section 6851: The Taxpayer's Rights and Remedies, supra* note 69, at 650, and could presumably occur under current law since § 7429 provides for review only subsequent to the making of the assessment.

[125] I.R.C. § 7429. In Commissioner v. Shapiro, 424 U.S. 614 (1976), the Court stated: "Nothing we hold today, of course, would prevent the Government from providing an administrative or other forum outside the Art. III judicial system for whatever preliminary inquiry is to be made as to the basis for a jeopardy assessment and levy." 424 U.S. at 630 n.12. This language is quoted in the legislative history of § 7429. *See* S. REP. No. 938, *supra* note 31, at 364, U.S. CODE CONG. & AD. NEWS at 3793.

I.R.C. § 7429 provides in relevant part:

(a) Administrative Review.—

(1) Information to taxpayer.—Within 5 days after the day on which an assessment is made under section 6851(a), 6861(a), or 6862, the Secretary shall provide the taxpayer with a written statement of the information upon which the Secretary relies in making such assessment.

(2) Request for review.—Within 30 days after the day on which the taxpayer is furnished the written statement described in paragraph (1), or within 30 days after the last day of the period within which such statement is required to be furnished, the taxpayer may request the Secretary to review the action taken.

reaction to *Commissioner v. Shapiro*,[126] this new section provides the taxpayer with a viable forum in which he may contest the reasonable-

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(3) Redetermination by Secretary.—After a request for review is made under paragraph (2), the Secretary shall determine whether or not—

(A) the making of the assessment under section 6851, 6861, or 6862, as the case may be, is reasonable under the circumstances, and

(B) the amount so assessed or demanded as a result of the action taken under section 6851, 6861, or 6862 is appropriate under the circumstances.

(b) Judicial review.—

(1) Actions permitted.—Within 30 days after the earlier of—

(A) the day the Secretary notifies the taxpayer of his determination described in subsection (a)(3), or

(B) the 16th day after the request described in subsection (a)(2) was made, the taxpayer may bring a civil action against the United States in a district court of the United States for a determination under this subsection.

(2) Determination by district court.—Within 20 days after an action is commenced under paragraph (1), the district court shall determine whether or not—

(A) the making of the assessment under section 6851, 6861, or 6862, as the case may be, is reasonable under the circumstances, and

(B) the amount so assessed or demanded as a result of the action taken under section 6851, 6861, or 6862, is appropriate under the circumstances.

(3) Order of district court.—If the court determines that the making of such assessment is unreasonable or that the amount assessed or demanded is inappropriate, the court may order the Secretary to abate such assessment, to redetermine (in whole or in part) the amount assessed or demanded, or to take such other action as the court finds appropriate.

(c) Extension of 20-Day period where taxpayer so requests.—If the taxpayer requests an extension of the 20-day period set forth in subsection (b)(2) and establishes reasonable grounds why such extension should be granted, the district court may grant an extension of not more than 40 additional days.

. . . .

(e) Venue.—A civil action under subsection (b) shall be commenced only in the judicial district described in section 1402(a)(1) or (2) of title 28, United States Code.

(f) Finality of determination.—Any determination made by a district court under this section shall be final and conclusive and shall not be reviewed by any other court.

(g) Burden of proof.—

(1) Reasonableness of termination or jeopardy assessment.—In an action under subsection (b) involving the issue of whether the making of an assessment under section 6851, 6861, or 6862 is reasonable under the circumstances, the burden of proof in respect to such issue shall be upon the Secretary.

(2) Reasonableness of amount of assessment.—In an action under subsection (b) involving the issue of whether an amount assessed or demanded as a result of action taken under section 6851, 6861, or 6862 is appropriate under the circumstances, the Secretary shall provide a written statement which contains any information with respect to which his determination of the amount assessed was based, but the burden of proof in respect of such issue shall be upon the taxpayer.

[126] 424 U.S. 614 (1976).

ness of both the making and the amount of a summary assessment. Whether the protection afforded under section 7429 is substantial enough to meet the constitutional guidelines outlined in *Shapiro* may, however, be questionable. Before considering the more technical provisions of section 7429, an analysis of the pertinent aspects of the Anti-Injunction Act, upon which *Shapiro* was decided, will be made in an effort to provide a relevant framework within which section 7429 may be viewed.

a. The Anti-Injunction Act

The Anti-Injunction Act[127] provides that no suit may be brought to restrain the assessment or collection of any tax.[128] On its face this statute clearly forbids the bringing of a suit to enjoin a jeopardy or termination assessment. There are, however, several exceptions to the statute which ensure that the taxpayer's right of access to the Tax Court will not be abridged. The most important exception allows a taxpayer to enjoin assessment or collection of the deficiency if a notice of deficiency has not been sent to him.[129] In addition, the Tax Reform Act of 1976 provides that, upon finding that the deficiency notice requirements applicable to a summary assessment have not been met, the district court may take such action as it deems appropriate.[130] Appropriate action would, presumably, include enjoining the assessment and collection of the tax.

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[127] I.R.C. § 7421.

[128] *Id.* § 7421(a) provides:

> (a) Tax.—Except as provided in sections 6212(a) and (c), 6213(a), and 7426(a) and (b)(1), and 7429(b) no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

[129] *Id.* § 6213(a) provides in pertinent part:

> Except as otherwise provided in section 6851 or section 6861 no assessment of a deficiency . . . and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until . . . notice has been mailed to the taxpayer . . . . Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined . . . .

This exception to the Anti-Injunction Act does not apply to termination and jeopardy assessments which are made "as . . . provided in" § 6851 and § 6861. If notice of deficiency is not properly sent pursuant to the relevant statutes, then § 7421 is inapplicable and assessment or collection may be enjoined. *See* Laing v. United States, 423 U.S. 161, 184 & n. 27 (1976) (if the proper notice of deficiency procedures are not followed then the § 6213(a) exception to § 7421 becomes operative); *cf.* Commissioner v. Shapiro, 424 U.S. 614, 632 (1976) (Anti-Injunction Act does not bar injunction where government's allegations are purely conclusory, because taxpayer must be given opportunity to investigate facts).

[130] I.R.C. § 7429(b)(3). See Part III. *E.* 2*b. infra* for a discussion of the new post-seizure review procedure in jeopardy and termination assessments.

There is also an important judicial exception to the Anti-Injunction Act. In *Miller v. Standard Nut Margarine*[131] the Court held that where a tax illegally assessed would, because of special facts and circumstances, work an extraordinary hardship on the taxpayer, assessment and collection of the tax may be enjoined.[132] These criteria were, however, modified in *Enochs v. Williams Packing & Navigation Co.*,[133] which established a more restrictive two-part test for the restraining of the collection of taxes. Under *Enochs*, collection of the assessed tax may be enjoined if equity jurisdiction exists and "it is clear that under no circumstances could the Government ultimately prevail" upon the claimed tax.[134] The second part of this test has proven nearly insurmountable for taxpayers since an injunction is appropriate under *Enochs* only if it is "apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim."[135]

The most recent case addressing the judicial exception to the Anti-Injunction Act is *Commissioner v. Shapiro.*[136] In *Shapiro*, the taxpayer was facing extradition to Israel to stand trial on criminal charges. The Internal Revenue Service, having found that the pending extradition jeopardized the collection of income taxes allegedly owed by Shapiro, immediately made a jeopardy assessment, filed liens against Shapiro's property, and levied on several of his bank accounts.[137] Shapiro brought suit to enjoin the assessment and collection of the tax, but the district court dismissed the complaint pursuant to the Anti-Injunction Act.[138] The court of appeals found that equity jurisdiction existed since the taxpayer would be incarcerated in Israel if he were unable to reach his frozen bank accounts to post bail.[139] Addressing the second requirement of *Enochs*, the court of appeals remanded the case for a determination of whether any "factual foundation" existed for the making of the assessment.[140]

The Supreme Court agreed with the court of appeals' finding that the first part of the *Enochs* test had been met.[141] The *Shapiro* Court then

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[131] 284 U.S. 498 (1931).

[132] *Id.* at 509-10; *see* Note, *supra* note 77, at 188.

[133] 370 U.S. 1 (1961).

[134] *Id.* at 6-7.

[135] *Id.* at 7. Courts have consistently refused to enjoin the Internal Revenue Service regardless of the proof offered and have treated the decision to make a jeopardy or termination assessment as a discretionary function beyond the reviewing power of any court. *See* Note, *supra* note 77, at 189.

[136] 424 U.S. 614 (1976).

[137] *Id.* at 619.

[138] *Id.* at 621.

[139] Shapiro v. Secretary of State, 499 F.2d 527, 535-36 (D.C. Cir. 1974) (per curiam), *aff'd*, 424 U.S. 614 (1976).

[140] 499 F.2d at 535-36.

[141] 424 U.S. at 629.

held, in interpreting the second part of the *Enochs* test, that since the taxpayer must know the basis of the assessment in order to show that the government has no chance of ultimately prevailing, the government has an obligation to present a factual basis rather than simply a good faith allegation to support the assessment.[142] Moreover, by noting that it is "very doubtful" whether the government's need to collect internal revenue is sufficient justification for seizure causing irreparable injury without a prompt postseizure inquiry,[143] the Court seemingly imposed constitutional limitations upon the operation of the Anti-Injunction Act.

b. Section 7429: Technical Aspects

Within five days after the making of a jeopardy or termination assessment, the Internal Revenue Service must send the taxpayer a written statement of the information upon which the Service relied in making the assessment.[144] Within thirty days after this five day period, the taxpayer may request the Secretary to review the propriety of the assessment.[145] After such a request, the Service must determine whether the making of the assessment is reasonable under the circumstances, and whether the amount so assessed or demanded is appropriate under the circumstances.[146] In making these determinations, the Service is to take into account not only the information available at the time the assessment was made, but also any information which has subsequently become available.[147] The assessment may be abated in whole or in part if the Service finds the assessment to be inappropriate or excessive, or if there is a finding that it would cause the taxpayer unusual hardship.[148]

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[142] *Id.* at 629-30. Arguing that the holding in *Shapiro* was not inconsistent with the *Enochs* standard, the Court stated that *Enochs* does not stand for the proposition that the government has no duty of disclosure. According to the Court, the *Enochs* holding states, rather, that the determination of whether the government could ultimately prevail is to be made on the basis of the information available to the government at the time of the suit. *Shapiro* is therefore in line with *Enochs* because without knowing what information was available to the government at the time of the suit, the taxpayer could not meet his burden of proof. *Id.* at 627-28. The Court noted, however, that the "burden of proof" remains with the taxpayer, and the government may require that facts in its possession be obtained through discovery. *Id.* at 628 & n. 10, 629.

[143] *Id.* at 630 n.12.

[144] I.R.C. § 7429(a)(1). For an illustration of the letters which will be sent see [1977] 2 INTERNAL REVENUE MANUAL (CCH) 9040-43.

[145] I.R.C. § 7429(a)(2).

[146] *Id.* § 7429(a)(3).

[147] S. REP. No. 938, *supra* note 31, at 364, U.S. CODE CONG. & AD. NEWS at 3794; *see* Loretto v. United States, 440 F. Supp. 1168, 1173 (E.D. Pa. 1977) (all relevant information should be considered).

[148] S. REP. No. 938, *supra* note 31, at 364 & n. 5, U.S. CODE CONG. & AD. NEWS at 3794.

The taxpayer has a right to judicial review if he is not satisfied with the results of the administrative review.[149] He may, within thirty days after the earlier of the date the Service makes a determination on his request or the sixteenth day following his request for administrative review, bring a civil action against the United States in the United States district court[150] for the district in which he resides.[151] Within twenty days after commencement of the action,[152] the district court must determine whether the making of the assessment is reasonable[153] and whether the amount assessed is appropriate.[154] Like the Secretary, the court must consider all relevant information bearing upon the propriety of the assessment regardless of when the information was acquired.[155]

In the judicial proceeding, the Internal Revenue Service has the burden of proving the making of the assessment was reasonable.[156] The taxpayer, however, has the burden of proving that the amount assessed is inappropriate under the circumstances, although the Service must in such a case provide a written statement containing information with respect to the basis for the assessment.[157] After presentation of the relevant facts, the court may abate the assessment in whole or in part or

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[149] I.R.C. § 7429(b).

[150] *Id.* § 7429(b)(1).

[151] *Id.* § 7429(e).

[152] *Id.* § 7429(b)(2). The district court may grant up to a 40 day extension of the 20 day period at the request of the taxpayer. *Id.* § 7429(c). No extension is to be granted the Service or the court. S. REP. No. 938, *supra* note 31, at 365, U.S. CODE CONG. & AD. NEWS at 3794.

[153] I.R.C. § 7429(b)(2)(A).

[154] *Id.* § 7429(b)(2)(B).

[155] S. REP. No. 938, *supra* note 31, at 365, U.S. CODE CONG. & AD. NEWS at 3794; *see* Loretto v. United States, 440 F. Supp. 1168, 1173 (E.D. Pa. 1977) (all relevant information should be considered).

[156] I.R.C. § 7429(g)(1), *construed in* Loretto v. United States, 440 F. Supp. 1168, 1172 (E.D. Pa. 1977). "[T]he district court should give no weight whatsoever to either (1) the initial decision by the Secretary . . . that an assessment was justified . . . or (2) the Secretary's affirmance of that initial decision on administrative appeal." *Id.* at 1172. The legislative history states that this burden is similar to the division of the burden of proof in civil fraud cases. Thus,

> [T]he burden of proof as to the reasonableness of the assessment is placed on the Treasury Department because the making of a jeopardy or termination assessment involves more severe consequences to the taxpayer than a normal assessment . . . . [T]he Treasury Department is not required to carry its burden of proof in the court review of a jeopardy or termination assessment under the special evidentiary standard of proof applicable to proving civil fraud, i.e., "clear and convincing evidence." Rather the usual standard is to apply, as it does where the government is given the burden of proof in a deficiency case on a tax issue it failed to raise in its notice of deficiency.

JOINT COMM. ON TAXATION, GEN'L EXPLANATION OF THE TAX REFORM ACT OF 1976, 94th Cong., 2d Sess. 363 (1976), *reprinted in* 1976-3 C.B. 1, 375.

[157] I.R.C. § 7429(g)(2).

take such other action as it deems appropriate.[158]

Although the decision of the district court is conclusive and is not reviewable by any other court,[159] it is not a determination of the ultimate tax liability of the taxpayer. The only issues in a section 7429 judicial review are whether the making of the assessment is reasonable and whether the amount assessed is appropriate on the basis of the presently available information.[160] Furthermore, a section 7429 judicial review is a separate proceeding that is both procedurally and substantively unrelated to any subsequent proceeding.[161]

F. Sufficiency of Section 7429

The review provided for in section 7429, while resembling the *Shapiro* "prompt post-seizure hearing," is not limited to taxpayers who can show irreparable injury; it is available to all taxpayers who are subjected to summary assessments.[162] Moreover, the time frame for review provided in this section appears to be reasonable. Although section 7429 seems to expand the protection granted to the taxpayer by *Shapiro*, a careful reading of the section reveals a linguistic discrepancy which may result in continued litigation of issues similar to those presented in *Shapiro*.

Section 7429 requires only that the making of the assessment be "reasonable under the circumstances."[163] In *Shapiro*, the Court suggested that "probable cause" is the minimum quantum of proof necessary to bar a suit to enjoin a summary assessment.[164] The legislative history of section 7429, while asserting that the making of the assessment must be "reasonable," indicates that the standards set forth in the Internal Revenue Manual as grounds for the making of a summary

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[158] *Id.* § 7429(b)(3).

[159] *Id.* § 7429(f), *construed in* Loretto v. United States, 440 F. Supp. 1168, 1170 (E.D. Pa. 1977).

[160] S. REP. No. 938, *supra* note 31, at 365, U.S. CODE CONG. & AD. NEWS at 3794.

[161] *Id.*, U.S. CODE CONG. & AD. NEWS at 3795.

[162] I.R.C. § 7429(a)(1).

[163] *Id.* § 7429(g)(1).

[164] 424 U.S. at 633. Although the "probable cause" test in *Shapiro* was set forth in reference to the Anti-Injunction Act, the Court stated that "[W]e are satisfied that the standard required by the Anti-Injunction Act is at least as favorable to the taxpayer as that required by the Constitution . . . ." *Id.* Beyond citing Gerstein v. Pugh, 420 U.S. 103 (1975), and North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975), the *Shapiro* Court did not qualify its use of the phrase "probable cause." In *Gerstein* the Court stated that probable cause " 'deal[s] with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.' " 420 U.S. at 121 (citations omitted). In *North Georgia Finishing*, the Court used the phrase without indicating what quantum of proof "probable cause" requires. 419 U.S. at 607.

assessment are reasonable.[165] This reasoning appears to be circular since the standards set forth in the Internal Revenue Manual as grounds for a summary assessment bear a striking resemblance to the statutory requirements for the making of a termination assessment.[166] Furthermore, the Internal Revenue Manual suggests that if collection of the tax is in jeopardy, the making of the summary assessment is reasonable.[167] Thus, in view of the legislative history of section 7429 and the interpretation of that section espoused in the Internal Revenue Manual that the standards for making a summary assessment remain intact, the issue becomes: what quantum of proof must the government present in a section 7429 review?[168]

Although there is little case law on the issue, one court has suggested, without mentioning the *Shapiro* "probable cause" standard, that "reasonable" requires something more than "arbitrary and capricious," but less than "substantial evidence."[169] Whether this somewhat vague standard will develop to require more of a factual basis than is required by the Internal Revenue Manual remains to be seen.[170] It would

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[165] S. REP. NO. 938, *supra* note 31, at 365 n.6, U.S. CODE CONG. & AD. NEWS at 3795; *see* Canon v. United States, 40 A.F.T.R.2d 77-5529, 77-5531 (D. Nev. 1977) (construing the legislative history). The Internal Revenue Manual stipulates that a jeopardy assessment should be made only if one of the following conditions are met:

> (a) The taxpayer is or appears to be designing quickly to place property beyond the reach of the Government either by removing it from the United States, or by concealing it, or by transferring it to other persons, or by dissipating it.
>
> (b) The taxpayer is, or appears to be designing quickly to depart from the United States, or to conceal himself/herself.
>
> (c) The taxpayer's financial solvency is or appears to be imperiled.

[1977] 2 INTERNAL REVENUE MANUAL (CCH) ¶ 5213.21, at 8836.

[166] *Compare* [1977] 2 INTERNAL REVENUE MANUAL (CCH) ¶ 5213.21, at 8836 *with* I.R.C. § 6851(a). Neither the legislative history of § 7429 nor the Internal Revenue Manual refers to the probable cause test of *Shapiro* as the proper standard for determining the reasonableness of the making of summary assessments.

[167] "The conferee will give full consideration as to whether: (1) [the] summary assessment action is reasonable under the circumstances, (i.e., whether the collection of the tax was in jeopardy). . . ." [1977] 2 INTERNAL REVENUE MANUAL (CCH) 9077-2.

[168] Section 7429 does not call for a full evidentiary hearing; rather, a summary proceeding allowing an independent determination by the federal district court as to the reasonableness of the assessment is sufficient. Canon v. United States, 40 A.F.T.R.2d 77-5529, 77-5531 (D. Nev. 1977).

[169] Loretto v. United States, 440 F. Supp. 1168, 1172 (E.D. Pa. 1977). The court referred to the Administrative Procedure Act as its basis for the "arbitrary and capricious" and "substantial evidence" standards. *Id.*

[170] In *Loretto,* the court concluded that the Internal Revenue Service had acted reasonably in making a termination assessment, although "[t]he inference [was] not a compelling one." In making its determination, the court found the following factors pertinent: quantities of marijuana and cocaine were found in the taxpayer's home; $14,500 was found in his home; he failed to report any income from the sale of the drugs; and, the IRS

seem, however, that the spirit, and possibly the constitutional sufficiency of section 7429 require the government to present facts sufficient to meet the "probable cause" test of *Shapiro*. If only a minimal quantum of proof is required of the government, this section could foster the very practice it was designed to prohibit. Moreover, under the termination provision, a taxpayer who is denied relief in a section 7429 review could, without any right to a Tax Court redetermination, have his assets frozen for months on end. Construing the language in *Shapiro* literally to require an adequate opportunity for an ultimate *judicial* determination of liability, one may well question whether the protection against abuse of the termination procedure offered by section 7429 is constitutionally sufficient. The standard of proof required of the government will ultimately control this issue.

Conclusion

By responding promptly to judicial action, Congress seems to have insulated the summary assessment procedures from successful constitutional attack. The present procedures afford the taxpayer a reasonable opportunity to question the validity of the assessment. But the taxpayer still may not be adequately protected, and inequities remain in the present system. To guard against further possible abuse, Congress should provide for the taxpayer's recovery of damages for wrongful deprivation of property if he ultimately prevails in Tax Court after having been denied section 7429 relief or, at the very least, for his recovery of attorneys' fees if he prevails in a section 7429 review.[171] When the government is made to provide adequate redress to taxpayers wronged by the Service's misuse of its collection procedures, then, and only then, can the taxpayer be assured that the IRS is performing what should be its only function—the proper collection of taxes legitimately owed to the government.

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was unable to locate any of the taxpayer's assets that could be used to satisfy the tax liability. *Id.* at 1174. This quantum of proof does seem to meet the "reasonableness" standard. Taken in conjunction with the court's conclusion that no weight should be given to the initial decision to make the assessment, the quantum of proof in *Loretto* probably also meets constitutional standards.

[171] *See The Civil Rights Attorneys' Fees Award Act of 1976*, 42 U.S.C. § 1988 (1976) (Allen amendment, perhaps providing for attorneys' fees to the prevailing taxpayer in this situation where there is bad faith); Levno v. United States, 1977-2 U.S.T.C. ¶ 9687, at 88,331 (D. Mont. 1977) (allowing attorneys' fees to prevailing taxpayer-plaintiff in a refund suit); *cf.* Haskins v. United States, 444 F. Supp. 299, 305 (C.D. Cal. 1977) (refusing to award attorneys' fees to a losing plaintiff in a § 7429 suit). *But see* Schulken Bros. Paper Stock Co. v. United States, 1977-2 U.S.T.C. ¶ 9712, at 88,408 (C.D. Cal. 1977) (attorneys' fees not appropriate where United States is not party plaintiff); Lieb v. United States, 1977-2 U.S.T.C. ¶ 9752, at 88,562 (E.D. Okla. 1977) (same); Key Buick Co. v. Commissioner, [1977] 68 Tax Ct. Rep. Dec. (P-H) ¶ 68.17, at 106-68 (Tax Court has no jurisdiction to award attorneys' fees under the Allen Amendment or any other provision of law).

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COMMENTS

GRAND JURY IMMUNITY IN MISSISSIPPI

A dynamic tension between the rights of the individual citizen and the interests of the state exists within our legal system. A vital purpose of the state is to protect society from crime and to deter future criminal activity. To effectuate this purpose, the state must necessarily possess extensive investigative powers that enable it to identify, apprehend and prosecute criminal agencies. At the same time, individual autonomy must be preserved. Thus, while the state may need the testimony of certain persons to fulfill its duty to society, the individual's constitutional privilege against self-incrimination[1] cannot be sacrificed to that end. Although at least one commentator[2] has observed that the state has managed to function within the restrictions of the privilege, in recent years, the state's need to compel testimony and the individual's privilege not to testify have emerged in sharp conflict.[3] To achieve a satisfactory balance between these conflicting interests, various procedural devices have been developed that operate simultaneously to limit the powers of investigative bodies and to facilitate their investigation of crime. This Comment will examine one such device—the statutory grant of immunity to compel self-incriminating testimony of witnesses in grand jury proceedings.

Witness immunity statutes[4] vary significantly in substance and in form. Some provide "use and derivative use" immunity,[5] which affords a witness protection from direct or indirect use of the compelled testi-

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[1] U.S. CONST. amend. V provides in part: "No person . . . shall be compelled in a criminal case to be a witness against himself . . . ."

[2] Note, *Immunity Statutes and the Constitution*, 68 COLUM. L. REV. 959, 959 (1968).

[3] See Comment, *Compulsory Immunity Legislation: Title II of the Organized Crime Control Act of 1970*, 1971 U. ILL. L.F. 91, 94 & n.29 (1971). It has been suggested that this conflict between the interests of the state and the restrictive nature of the privilege increased primarily because of the increase in organized crime. *Id. See generally* U.S. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME (1967).

[4] For a list of federal immunity statutes, see 8 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2281, at 495 n.11 (McNaughton rev. 1961); Note, *supra* note 2, at 110 app.; Note, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope*, 72 YALE L.J. 1568, 1611 app.A (1963). It should be noted that these statutes have either been conformed to or repealed by the immunity provision of the Organized Crime Control Act of 1970, 18 U.S.C. § 6002 (1976). *See* Goldberg v. United States, 472 F.2d 513, 515 (2d Cir. 1973) (the Organized Crime Control Act of 1970 repealed all previous transactional immunity statutes). For a list of state immunity statutes, see 8 J. WIGMORE, *supra*, § 2281, at 496 n.11.

[5] Note, *Constitutional Law: Immunity, the Dilemma of "Transactional" Versus "Use,"* 25 OKLA. L. REV. 109, 109 (1972).

mony in a subsequent prosecution. Others grant "transactional" immunity,[6] which prohibits prosecution of the witness for any crime to which his compelled testimony relates. The statutes can also be classified as either "automatic" or "claim."[7] Under an "automatic" type statute, immunity attaches upon the rendition of sworn testimony when the subject matter of the testimony is covered by the immunity statute.[8] The "claim" type statute immunizes the witness upon his assertion of the privilege against self-incrimination.[9] All types of immunity seek to eliminate the possibility of self-incrimination and to mitigate the inhibitive effect of the privilege, thereby enabling the state to compel testimony without encroaching upon individual autonomy.[10]

In Mississippi, the practice of immunizing witnesses from prosecution in order to obtain incriminating testimony in grand jury proceedings is ambiguous, overly broad, and largely ineffective. The purpose of this Comment is to contrast Mississippi's statutory scheme with the constitutional dictates of the United States Supreme Court and the pragmatic considerations reflected in the federal witness immunity statutes. Perhaps illustration of the confusion inherent in our state system will prompt needed legislative revision.

I. Historical Background

Originating in England,[11] the grand jury provides an arena wherein the rights of the accused are theoretically harmonized with the investigative interest of the state.[12] Although originally an accusatorial body,

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[6] *Id.*

[7] *See generally* Singer, *State Grants of Immunity—The Problem of Interstate Prosecution Prevention*, 58 J. Crim. L.C. & P.S. 218, 220 (1967); 38 Brooklyn L. Rev. 222, 222-25 (1971).

[8] Comment, *supra* note 3, at 97 n.62.

[9] *Id.*

[10] Note, *supra* note 2, at 959.

[11] From a somewhat disputed origin, most historians trace the development of the grand jury from the Assize of Clarendon in 1166 during the reign of Henry II. M. Frankel & G. Naftalis, The Grand Jury—An Institution on Trial 6 (1977). Although the establishment of the first criminal grand jury is believed to have occurred in England, 1 W. Holdsworth, A History of English Law 321 (7th ed. A. Goodhart & H. Hanbury 1956); 2 F. Pollock & F. Maitland, The History of English Law 642 (2d ed. 1959), the origin has been traced to Greek, Roman and Scandinavian institutions antedating the English practice. Note, *The Grand Jury As An Investigatory Body*, 74 Harv. L. Rev. 590, 590 n.1 (1961).

[12] Originally designed to facilitate the effective functioning of law enforcement authorities in the apprehension of criminals, the grand jury gradually became a source of protection for the criminally accused from prosecutorial abuse or misconduct. *See* Note, *supra* note 11, at 590, 592-99 (author enumerates and discusses various restraining "controls" over the grand jury's investigatory function).

Regarding the protective function of the grand jury, it has been stated that "[t]he

the grand jury presently serves an equally important discovery function in its investigation of criminal activity.[13] Fundamental to the grand jury's investigative process is the power to compel testimony.[14]

The English common law oath ex officio required a person to answer all questions asked by church officials without presentment or accusation.[15] The oath gave this power first to the ecclesiastical courts[16] and later to the Star Chamber.[17] Eventually, however, the schism between the church and the state,[18] and public outcry against the practice of compelling incriminating testimony[19] led to judicial abolition of the oath[20] and prompted development of the privilege *nemo tenetur seipsum accusare*—"no one is bound to accuse himself."[21] In practice, the privilege was far from absolute; it did not relieve an individual from being

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grand jury earned its place in [our legal system] by its shield, not by its sword." United States v. Cox, 342 F.2d 167, 186 (5th Cir. 1965) (Wisdom, J., specially concurring).

[13] *Panel and Discussion—Distinctions Between an Investigatory Grand Jury and the Ethical, Moral, and Legal Obligations of the Prosecutor in a Grand Jury Investigation as to: (a) Counsel, (b) Witness, and (c) Putative Defendants,* 67 F.R.D. 536, 537 (1975). Therein, the notion that the grand jury serves as a "protective buffer" for the criminal suspect is described as a myth. *Id.* at 538. *But cf.* United States v. Mandujano, 425 U.S. 564, 573 (1976) ("It is in keeping with the grand jury's historic function as a shield against arbitrary accusations to call before it persons suspected of criminal activity, so that the investigation can be complete.").

[14] Kastigar v. United States, 406 U.S. 441, 443 (1972) (United States government may compel testimony from witness by conferring immunity from use of testimony in subsequent criminal proceedings, as well as immunity from use of evidence derived from the testimony). *See generally* 8 J. WIGMORE, *supra* note 4, § 2195, at 78-80.

[15] Morgan, *The Privilege Against Self-Incrimination,* 34 MINN. L. REV. 1, 1 (1949). For a discussion of the evolution of the oath, see Silving, *The Oath: I,* 68 YALE L.J. 1329 (1959).

[16] The common law oath ex officio was utilized in ecclesiastical courts as early as 1236. 3 SETON HALL L. REV. 199, 200 (1971). *See generally* L. LEVY, ORIGINS OF THE FIFTH AMENDMENT (1968); *see also* Morgan, *supra* note 15, at 1-18; Silving, *supra* note 15, at 1366.

[17] L. LEVY, *supra* note 16, at 101; *see* Bauer, *Reflections on the Role of Statutory Immunity in the Criminal Justice System,* 67 J. CRIM. L. & CRIMINOLOGY 143, 144 (1976).

[18] *See* 3 SETON HALL L. REV. 199, 200 (1971).

[19] In 1637 the Lilburn Trial, 3 How. St. Tr. 1315 (1637), *discussed in* L. LEVY, *supra* note 16, at 301-12, resulted in the brutal whipping of John Lilburn because he refused to respond to the oath ex officio. The events of the Lilburn Trial led to the establishment of the privilege against self-incrimination in English law, L. LEVY, *supra* note 16, at 313, and it is said that by his actions, "Freeborn John" Lilburn sired the common law privilege which is today essential to our constitutional legal system. E. GRISWOLD, THE FIFTH AMENDMENT TODAY 3 (1955).

[20] Lilburn Trial, 3 How. St. Tr. 1315 (1637), *discussed in* L. LEVY, *supra* note 16, at 275-81. See note 19 *supra.*

[21] This maxim was merely an evidentiary rule in sixteenth century England. *See* E. GRISWOLD, *supra* note 19, at 2; 3 SETON HALL L. REV. 199, 200 (1971). Inherited from the common law, the maxim provided the basis for and "became clothed . . . with the impregnability of a constitutional enactment." Brown v. Walker, 161 U.S. 591, 597 (1896).

forced to give "relevant and truthful testimony,"[22] nor allow nondisclosure of an individual's knowledge concerning a particular crime.[23] Treated as a mere rule of evidence, the privilege against self-incrimination, in and of itself, did little to impair the well-established power of testimonial compulsion.[24] The practice of granting immunity from penal consequences to witnesses who, notwithstanding the privilege, were compelled to testify, first emerged in a 1710 English statute.[25]

American colonial laws reflected the public indignation provoked by abuse of the common law oath ex officio.[26] As a consequence, the privilege against self-incrimination became firmly imbedded in our criminal justice system and was finally codified in the fifth amendment to the United States Constitution,[27] as well as in most state constitutions.[28] While recognizing the need for broad governmental power of testimonial compulsion,[29] the American judiciary held early in our his-

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[22] *See* Note, *Witness Immunity Statutes: The Constitutional and Functional Sufficiency of "Use Immunity,"* 51 B.U.L. REV. 616, 618 (1965).

[23] *Id.*

[24] Notwithstanding the privilege, the statutory law of England provided for the compulsion of testimony, Kastigar v. United States, 406 U.S. 441, 443 & n.3 (1972) (citing Statute of Elizabeth, 5 Eliz. 1, ch. 9, § 12 (1562)), and by 1742, the right of the public to compel testimony from an individual was certain. *See* Kastigar v. United States, 406 U.S. 441, 443 & n.5 (1972). *See generally* Piemonte v. United States, 367 U.S. 556, 559 n.2 (1961) ("The public has a right to every man's evidence.") (quoting 12 T. HANSARD, PARLIAMENTARY HISTORY OF ENGLAND 693 (1812)).

[25] Directed against illegal gambling, the 1710 Act provided that a winner sued by a loser could be compelled to answer the latter's charges. But, upon responding, the winner was to "be acquitted, indemnified, and discharged from any further or other punishment, forfeiture, or penalty." 9 Anne, ch. 19, §§ 3-4 (1710) (repealed by the Gaming Act of 1845, 8 & 9 Vict., ch. 109, § 15), *cited and discussed in* Kastigar v. United States, 406 U.S. 441, 445 n.13 (1972). The 1710 Act, held effective in this country, United States v. Dixon, 25 F. Cas. 872, 873 (C.C.D.C. 1830), served as a model for a similar immunity enactment passed in 1774 in New York. Law of Mar. 9, 1774, c. 1651, 5 Colonial Laws of N.Y. 621, 623 (1894), *cited and discussed in* Kastigar v. United States, 406 U.S. 441, 445 n.13 (1972).

[26] E. GRISWOLD, *supra* note 19, at 4-6; 3 SETON HALL L. REV. 199, 200-01 (1971). *See generally* Pittman, *Colonial and Constitutional History of the Privilege Against Self-Incrimination in America,* 21 VA. L. REV. 763 (1935).

[27] U.S. CONST. amend. V provides in part: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." The privilege can be traced to the trials of the Antinomian "heretics" in Massachusetts in 1637. E. GRISWOLD, *supra* note 19, at 4.

[28] *See* Note, *supra* note 2, at 959 n.2.

[29] The order and stability of our society depend on the free exercise of the government's power to gather information concerning criminal activity. Thus, the scope of the "testimonial duty" is necessarily broad. Note, *supra* note 4, at 1568.

The power to compel testimony was recognized early in our history. The Judiciary Act of 1789 provided for compulsory attendance of witnesses in federal courts. 1 Stat. 73, 88 (1789). This power, and the concomitant duty to testify, are embodied in our constitution. U.S. CONST. amend. VI. *See generally* Lilienthal, *The Power of Governmental Agencies to Compel Testimony,* 39 HARV. L. REV. 694 (1926).

tory that the corresponding privilege of a witness not to testify against himself must also be broad.[30] Since the trial of Aaron Burr for treason,[31] in which Chief Justice John Marshall sustained a witness' right to refuse to answer an incriminating question,[32] the Court has consistently reaffirmed the privilege as fundamental to the American concept of liberty.[33]

The fifth amendment privilege against self-incrimination may be asserted in both federal and state proceedings,[34] including grand jury investigations.[35] Unless a witness voluntarily responds to questions,[36] the

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The United States Supreme Court has stated: "Among the necessary and most important of the powers of the States as well as the Federal Government to assure the effective functioning of government in an ordered society is the broad power to compel residents to testify . . . before grand juries . . . ." Murphy v. Waterfront Comm'n, 378 U.S. 52, 93-94 (1964).

[30] The scope of the privilege has been defined in terms of the probability of self-accusation of a witness through disclosure of certain facts.

> Many links frequently compose that chain of testimony, which is necessary to convict any individual of a crime. It appears . . . to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible but a probable case, that a witness disclosing a single fact, may complete the testimony against himself; and to every effectual purpose accuse himself as entirely as he would be stating every circumstance which would be required for his conviction. That fact of itself might be unavailing; but all other facts without it would be insufficient . . . . The rule which declares, that no man is compelled to accuse himself, would most obviously be infringed, by compelling a witness to disclose a fact of this description.

1 BURR'S TRIAL 244 (D. Robertson ed. 1808). *See* Comment, *supra* note 3, at 92 n.15; Note, *supra* note 4, at 1568-69.

[31] In Burr's case, a witness for the prosecution was offered a presidential pardon designed to annul the privilege. The witness refused the pardon, but chose to testify. United States v. Burr, 25 F. Cas. 38, 40 (C.C.D. Va. 1807); *see* Wendel, *Compulsory Immunity Legislation and the Fifth Amendment Privilege: New Developments and New Confusion*, 10 ST. LOUIS U.L.J. 327, 330-31 (1966).

[32] United States v. Burr, 25 F. Cas. 38-41 (C.C.D. Va. 1807). *See* L. LEVY, *supra* note 16, at 429.

[33] The Court has recognized the privilege as reflecting "a complex of our fundamental values and aspirations," Kastigar v. United States, 406 U.S. 441, 444 (1972), and marking "an important advance in the development of our liberty." *Id. See generally* E. GRISWOLD, *supra* note 19, at 7-10; Comment, *supra* note 3, at 93 & n.28.

[34] Malloy v. Hogan, 378 U.S. 1, 6 (1964) (privilege against self-incrimination is safeguarded against state infringement by the fourteenth amendment). The privilege may "be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory." Kastigar v. United States, 406 U.S. 441, 444 (1972). It also applies in any circumstances of official interrogation. *See* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 125, at 267 (2d ed. 1972).

[35] United States v. Washington, 431 U.S. 181, 186 (1977) ("[I]t is well settled that the Fifth Amendment privilege extends to grand jury proceedings . . . ."); Lefkowitz v. Turley, 414 U.S. 70, 76 (1973) (state cannot force public contractors to waive immunity or to testify by threats of contract cancellation); United States v. Luxenburg, 374 F.2d 241, 246 (6th Cir. 1967) (person before a grand jury against whom the prosecuting attorney is not seeking an indictment need not be advised of his fifth amendment rights); *In re*

privilege protects against any testimonial disclosures that might be used against the witness in subsequent prosecutions.[37] Applying only to natural persons,[38] the privilege is personal[39] and must be claimed[40] by a party who is testifying.[41] Therefore, unless the witness expressly asserts the privilege,[42] it is deemed waived.[43] Furthermore, since a witness can remain silent by invoking the privilege, it is automatically waived upon the witness' recitation of incriminating facts,[44] or when a defendant voluntarily testifies in his own behalf.[45] If the witness is compelled to testify pursuant to a valid grant of immunity, however, there is no waiver since the immunity completely supplants the privilege.[46]

Levinson, 219 F. Supp. 589, 592 (S.D. Cal. 1905) (presumption exists that the privilege against self-incrimination should be permitted). *See generally* 8 J. WIGMORE, *supra* note 4, § 2252, at 327-28.

[36] Malloy v. Hogan, 378 U.S. 1, 8 (1964) (evidence freely and independently secured from the accused may be used to establish guilt).

[37] Kastigar v. United States, 406 U.S. 441, 445 (1972); *see* Hoffman v. United States, 341 U.S. 479, 486 (1951) (privilege against self-incrimination extends to testimony which might furnish a link in the chain of evidence needed to prosecute the claimant); Blau v. United States, 340 U.S. 159, 161 (1950) (fifth amendment is violated when a witness is compelled under the Smith Act to respond to questions concerning his membership in the Communist Party); Mason v. United States, 244 U.S. 362, 365 (1917) (the determination of whether an answer may incriminate a witness is within the trial court's discretion).

[38] The privilege is not available to associations or unions, United States v. White, 322 U.S. 694, 699-701 (1944) (incorporated labor unions' officers not allowed to invoke fourth and fifth amendment rights), nor to corporations, Wilson v. United States, 221 U.S. 361, 379-80 (1911) (privilege against self-incrimination does not protect officer of a corporation who is compelled to produce corporate books).

[39] Rogers v. United States, 340 U.S. 367, 368 (1951) (witness may not invoke fifth amendment privilege because of a desire to protect another person).

[40] The privilege must be claimed by the ordinary witness for it is "merely an option of refusal, not a prohibition of inquiry." 8 J. WIGMORE, *supra* note 4, § 2268, at 402.

[41] *See* Schmerber v. California, 384 U.S. 757, 761, 765 (1966) (blood taken from accused not testimony within protective purview of the privilege); C. MCCORMICK, *supra* note 34, § 124, at 264-66 (privilege attaches only to evidence of a "testimonial" or "communicative" nature); *cf.* Cupp v. Murphy, 412 U.S. 291 (1973). The Court held in *Cupp* that the taking of fingernail scrapings did not constitute an unlawful search. *Id.* at 295-96. Mr. Justice Douglas, in dissent, suggested that the privilege against self-incrimination may have been violated by such a search. *Id.* at 303-04 (Douglas, J., dissenting).

[42] The determination of the legitimacy of the assertion of the privilege is within the sound discretion of the trial judge and involves considerations of the form of "penalty" a witness may suffer. *See generally* Note, *supra* note 22, at 619-20; Note, *supra* note 2, at 964-69.

[43] *See* Note, *supra* note 4, at 1569 n.7.

[44] Rogers v. United States, 340 U.S. 367, 371-74 (1951).

[45] Spies v. Illinois, 123 U.S. 131, 180 (1887) (witness who voluntarily testifies for himself must submit to cross-examination).

[46] Kastigar v. United States, 406 U.S. 441, 445 n.13 (1972); Note, *supra* note 22, at 619 n.26.

II. Immunity Supplanting the Privilege Against Self-incrimination

A. *Immunity Legislation and the Supreme Court: An Historical Perspective*

Although colonial legislation authorized grants of immunity to witnesses to compel testimony,[47] it was not until 1857 that the first federal witness immunity statute was enacted.[48] By granting absolute immunity[49] to a witness who merely mentioned involvement in criminal activity,[50] the 1857 Act evoked criticism from legal commentators as constituting an "immunity bath."[51] The Act was soon replaced by a more restrictive statute[52] that prohibited only direct prosecutorial use of a witness' testimony given before Congress;[53] it did not prevent prosecution of the witness based upon independent evidence derived from the testimony.[54] The power to compel testimony by granting this limited

[47] *See generally* L. Levy, *supra* note 16, at 359, 384-85, 389, & 402-03 (discussion of enactments of the colonial legislatures of Pennsylvania and New York). For further discussion of the history of immunity legislation, see Dixon, *The Fifth Amendment and Federal Immunity Statutes*, 22 Geo. Wash. L. Rev. 447 (1954); Rief, *The Grand Jury Witness and Compulsory Testimony Legislation*, 10 Am. Crim. L. Rev. 829 (1972); Wendel, *supra* note 31; Note, *supra* note 22; Note, *supra* note 2; Note, *Judicial Enforcement of Nonstatutory "Immunity Grants": Abrogation by Analogy*, 25 Hastings L.J. 435, 443-50 (1974); Note, *supra* note 5; Comment, *Immunity From Prosecution: Transactional Versus Testimonial or Use*, 17 S.D.L. Rev. 166 (1972); Comment, *Federalism and the Fifth: Configurations of Grants of Immunity*, 12 U.C.L.A.L. Rev. 561 (1965); Note, *supra* note 4. The Supreme Court has occasionally traced the history of immunity legislation, *e.g.*, Piccirillo v. New York, 400 U.S. 548, 552 (1971) (Brennan, J., dissenting); Ullmann v. United States, 350 U.S. 422, 429-31 (1956); Counselman v. Hitchcock, 142 U.S. 547, 565-86 (1892), as have reports of congressional committees on immunity legislation, *e.g.*, S. Rep. No. 153, 83d Cong., 1st Sess. (1953).

[48] Act of Jan. 24, 1857, ch. 19, § 2, 11 Stat. 155 (granting immunity for "any fact or act" about which witness was required to testify before either House of Congress or committee thereof).

[49] The language of the act immunizing the witness as to "any fact or act" about which he was compelled to testify indicates that this was a transactional immunity statute. Comment, *supra* note 3, at 95 n.37. Still, it is assumed that the transactional immunity rule was established in Counselman v. Hitchcock, 142 U.S. 547 (1892). See notes 59 through 61 and accompanying text *infra*. *See also* Note, *Standards for Exclusion in Immunity Cases After Kastigar and Zicarelli*, 82 Yale L.J. 171, 172 (1972).

[50] Note, *supra* note 22, at 623.

[51] "[T]he committee rooms of Congress were soon converted into confessionals to which the criminals of the land rushed to wash away their sins." Note, *supra* note 4, at 1572.

[52] Act of Jan. 24, 1862, ch. 11, 12 Stat. 333.

[53] The statute provided: "[T]he testimony of a witness examined and testifying before either House of Congress . . . shall not be used as evidence in any criminal proceeding against such witness in any court of justice . . . ." *Id.*

[54] In fact, law enforcement officials could utilize the testimonial evidence of a witness

form of use immunity was later extended to judicial proceedings,[55] but it was not invoked by the federal courts for almost twenty years.[56] With the passage of the Interstate Commerce Act,[57] however, the need for an efficient means of gathering information concerning criminal violations became apparent,[58] and the United States Supreme Court was soon forced to define the allowable limits of immunity legislation.

In *Counselman v. Hitchcock*,[59] the Court reasoned that unless an immunity statute is coextensive with the fifth amendment privilege against self-incrimination, it is clearly unconstitutional.[60] The requisite coextensiveness was defined in terms of absolute immunity from prosecution: "[N]o statute which leaves the party or witness subject to prosecution after he answers the criminating questions put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States."[61]

Congress quickly responded[62] to the *Counselman* decision with an act providing transactional immunity to a witness compelled to testify before the ICC.[63] Reiterating Congress' concern for expedient enforcement of the Commerce Act, the Court in *Brown v. Walker*[64] upheld the new immunity act by a five to four majority.[65] Rejecting the contention

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to gather "leads" sufficient to convict a witness subsequently of a crime which he had referred to in his compelled former testimony. Note, *supra* note 22, at 623.

[55] Act of Feb. 25, 1868, ch. 13, 15 Stat. 37.

[56] Note, *supra* note 4, at 1572. *But see* United States v. McCarthy, 18 F. 87, 88 (C.C.S.D.N.Y. 1885) (statute was ignored because it was not based on apprehension of prosecution).

[57] Interstate Commerce Act, 24 Stat. 379 (1887) (codified in scattered sections of 49 U.S.C.).

[58] Note, *supra* note 4, at 1572-73.

[59] 142 U.S. 547 (1892). After being directed to testify, the witness, relying on his privilege, had refused to testify and was adjudged in contempt of court by the Circuit Court for the Northern District of Illinois. *Id.* at 552-53.

[60] *Id.* at 585.

[61] *Id.*

[62] Within sixteen days, a new bill was introduced in Congress. *See* Note, *supra* note 4, at 1573 & n.26.

[63] Act of Feb. 11, 1893, ch. 83, 27 Stat. 443 (repealed 1970). The immunizing language of the statute read: "[N]o person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify . . . ." *Id.*

The passage of this act, indicating a departure from the enactment of general immunity legislation, set a precedent for all subsequent immunity legislation. Note, *supra* note 4, at 1574.

Most pre-*Kastigar* statutes contained this broad form of immunity. Note, *supra* note 4, at 1579. The language of the statute is that of "transactional" immunity. *See* Kastigar v. United States, 406 U.S. 441, 452 (1972) (referring to the statute as a "transactional immunity statute").

[64] 161 U.S. 591 (1896).

[65] *Id.* at 610. The act had previously been held invalid in United States v. James, 60

that the fifth amendment privilege conveys a right of absolute silence or a shield from personal disgrace,[66] the Court held that the purpose of the privilege is to protect a witness only from being compelled to furnish testimony that might subsequently subject him to criminal prosecution.[67] The *Brown* Court construed the statute as immunizing a federal witness from state prosecution,[68] thereby fashioning a rule of interjurisdictional immunity.[69]

After *Brown*, Congress continued to enact immunity statutes to facilitate federal regulatory activities,[70] while the Court consistently reaffirmed the *Counselman* standards.[71] By 1954, the Kefauver investigations of organized crime, coupled with the political hysteria of McCarthyism, had prompted Congress to extend the focus of immunity legislation to matters of national security.[72] The resultant act,[73] which required the Attorney General's approval as a prerequisite to a grant of

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F. 257 (D.N.D. Ill. 1894).

[66] 161 U.S. at 605.

[67] *Id.* at 606.

[68] *Id.* at 608.

[69] Bolstered by the strength of the supremacy clause, U.S. CONST. art. VI, § 2, this decision left witnesses in state prosecutions in a precarious position. An immunized federal witness was relieved from the threat of a subsequent state prosecution based upon his compelled testimony. Reina v. United States, 364 U.S. 507, 510 (1960); Ullmann v. United States, 350 U.S. 422, 434-36 (1956); Adams v. Maryland, 347 U.S. 179, 181-82 (1954). Despite this protection, for a witness compelled to testify before a state tribunal, the fear of prosecution in another jurisdiction was very real. Jack v. Kansas, 199 U.S. 372, 380 (1906), indicated that a state grant of immunity failed to immunize a witness from federal prosecution or to prevent the use of the compelled testimony against him in such an action. *Id.* at 380. *See also* Knapp v. Schweitzer, 357 U.S. 371, 379-80 (1958) (state grant of immunity ineffective against federal prosecution); Feldman v. United States, 322 U.S. 487, 489-90 (1944) (evidence derived from testimony under state immunity grant introduced in federal prosecution); United States v. Interborough Delicatessen Dealers Ass'n, 235 F. Supp. 230, 231 (S.D.N.Y. 1964) ("[A] state may not unilaterally extend an immunity from federal prosecution.").

This problem was raised indirectly by the decision in Malloy v. Hogan, 378 U.S. 1, 6 (1964) where the fifth amendment privilege against self-incrimination was applied to the states via the fourteenth amendment. *Cf.* Note, *The Scope of Testimonial Immunity Under the Fifth Amendment*, 67 NW. U.L. REV. 106, 110-11 (1972) (author discusses the problem of the "two sovereignties" rule).

[70] *See* Note, *supra* note 4, at 1575-77 (author chronologically catalogues federal immunity legislation after *Brown*).

[71] *E.g.*, Reina v. United States, 364 U.S. 507, 514 (1960); Ullmann v. United States, 350 U.S. 422, 431 (1956); Adams v. Maryland, 347 U.S. 179, 182-83 (1954); Smith v. United States, 337 U.S. 137, 146 (1949); United States v. Monia, 317 U.S. 424, 428 (1943); United States v. Murdock, 284 U.S. 141, 149 (1931); McCarthy v. Arndstein, 266 U.S. 34, 40 (1924). *See also* Piccirillo v. New York, 400 U.S. 548, 563 (1971) (Brennan, J., dissenting) (any jurisdiction compelling testimony by offering immunity should grant total immunity, not just use immunity).

[72] Note, *supra* note 4, at 1576 & n.44, 1577.

[73] Immunity Act of 1954, ch. 769, § 1, 68 Stat. 745 (repealed 1970).

transactional immunity, was upheld by the United States Supreme Court in *Ulmann v. United States.*[74] Speaking for the majority, Justice Frankfurter stated that statutes granting complete immunity from prosecution had become "part of our constitutional fabric."[75] In several significant decisions presaging the development of the present standard, however, the broad scope of immunity granted by the federal acts[76] was chiseled away to conform with notions of federalism.[77]

With the application of the fifth amendment to state proceedings[78] and the interjurisdictional immunity problems fostered by *Brown* came the genesis of the present "use and derivative use" standard governing statutory grants of immunity.[79] In *Murphy v. Waterfront Commission,*[80] the Court held that a grant of immunity in one jurisdiction is binding on other jurisdictions,[81] but that use and derivative use immunity is sufficient.[82] The Court justified this bold step[83] from the absolute immunity of *Counselman* by placing a heavy burden upon prosecutors. In a significant footnote, the Court stated that "[o]nce a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence."[84] Despite this rhetoric, the problem of "tainted" evidence[85] and

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[74] 350 U.S. 422 (1956) (grand jury investigation of wartime spying—witness refused to testify, asserting his fifth amendment privilege as a shield for his political beliefs).

[75] *Id.* at 438.

[76] See note 4 *supra.*

[77] See notes 66 through 69 and accompanying text *supra.*

[78] Malloy v. Hogan, 378 U.S. 1, 6 (1964).

[79] Bauer, *supra* note 17, at 145.

[80] 378 U.S. 52 (1964).

[81] *Id.* at 77-78.

[82] *Id.* at 79.

[83] The *Murphy* Court created an interjurisdictional use restriction on compelled testimony, but seemed to retain the broader *Counselman* standards on the intrajurisdictional level, that is, where the questioning and prosecuting jurisdictions are the same. 3 SETON HALL L. REV. 199, 204 (1971). This left many commentators in a quandry. *See generally* Wendel, *supra* note 31; Note, *supra* note 22, at 631-33; Note, *State Immunity Statutes in Constitutional Perspective,* 1968 DUKE L. REV. 311, 311-15; Editorial Note, *Federal Immunity Statutes: Problems and Proposals,* 37 GEO. WASH. L. REV. 1276, 1283-87 (1969); Note, *supra* note 5; Note, *Counselman, Malloy, Murphy and the State's Power to Grant Immunity,* 20 RUTGERS L. REV. 336, 343 (1966); Comment, *Immunity From Prosecution: Transactional versus Testimonial or Use,* 17 S.D.L. REV. 166, 169-70 (1972); Comment, *Federalism and the Fifth: Configurations of Grants of Immunity,* 12 U.C.L.A.L. REV. 561, 577-78 (1965).

[84] 378 U.S. at 79 n.18.

[85] In Albertson v. Subversive Activities Control Bd., 382 U.S. 70 (1965), the Court identified a "quantum component" of the standards, conforming to *Murphy,* but not expressly rejecting *Counselman.* Striking down a statute requiring registration of Com-

the move toward a use and derivative use standard[86] plagued the post-*Murphy* Supreme Court throughout the latter part of the sixties.[87]

Congressional reaction to *Murphy* led to enactment of the Organized Crime Control Act of 1970.[88] This Act repealed all authority for grants of transactional immunity and adopted the use and derivative use form, prohibiting only direct or indirect exploitation of compelled testimony.[89] While the Act itself seemed unambiguous, the lower courts divided on the issue of whether a grant of immunity which left the witness subject to criminal prosecution based on independent evidence could constitutionally supplant the fifth amendment privilege.[90] This issue was not resolved for almost two years.

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munist Party members, Subversive Activities Control Act of 1950, ch. 1024, § 7, 64 Stat. 793 (repealed 1968), the Court stated that the statute failed to "preclude any use of the information called for . . . either as evidence or as an investigatory lead." 382 U.S. at 80. *See generally* Mansfield, *The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information*, 1966 SUP. CT. REV. 103.

[86] Recognizing the dilemma created by *Murphy*, Mr. Justice Harlan in Stevens v. Marks, 383 U.S. 234 (1966) (Harlan, J., concurring in part and dissenting in part), stated: "[T]his Court has recently extended the Fifth Amendment to the States . . . and abolished the 'two sovereignties' rules so that an expansive reading of the privilege could have a far more serious impact than was true in the days of *Counselman*." *Id.* at 250.

Still, the Court postponed direct confrontation of the determination of which standard—*Murphy* (use and derivative use) or *Counselman* (transactional)—was controlling. *Id.* at 244.

[87] Although consistently recognizing the validity of statutorily-imposed use restrictions in several cases, the post-*Murphy* Supreme Court offered no firm resolution to the immunity standards dilemma. *E.g.*, Gardner v. Broderick, 392 U.S. 273, 278 (1968); Haynes v. United States, 390 U.S. 85, 99-100 (1968); Grosse v. United States, 390 U.S. 62, 71-72 (1968); Marchetti v. United States, 390 U.S. 39, 58-60 (1968); United States v. Blue, 384 U.S. 251, 255 (1966).

A concomitant confusion was felt in the lower courts prior to the creation of the present standards. *Compare* United States *ex rel.* Catena v. Elias, 449 F.2d 40, 42-44 (3d Cir. 1971) *and In re* Korman, 449 F.2d 32, 37-38 (7th Cir. 1971) *and In re* Kinoy, 326 F. Supp. 407, 412 (S.D.N.Y. 1971) *with* Stewart v. United States, 440 F.2d 954, 956-57 (9th Cir. 1971), *aff'd sub nom.* Kastigar v. United States, 406 U.S. 441 (1972) *and* Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 426 F.2d 619, 626-27 (2d Cir. 1970) *and* Zicarelli v. New Jersey State Comm'n of Investigation, 55 N.J. 249, 261 A.2d 129, 137-39 (1970), *aff'd*, 406 U.S. 472 (1972).

[88] The Organized Crime Control Act, 18 U.S.C. §§ 6601-6605 (1976).

[89] The statute reads in pertinent part: "[N]o testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case . . . ." 18 U.S.C. § 6002 (1976).

[90] See note 87 *supra*. The split among the circuits was indicated by decisions in two United States Courts of Appeals construing the Act. In Stewart v. United States, 440 F.2d 954, 957 (9th Cir. 1971), *aff'd sub nom.* Kastigar v. United States, 406 U.S. 441 (1972), the Ninth Circuit upheld the constitutionality of the general immunity provision of the Act, while in the Seventh Circuit, it was held that use immunity is insufficient to supplant the fifth amendment privilege against self-incrimination. *In re* Korman, 449 F.2d 32, 34-

B. *Kastigar and Resolution of the Immunity Dilemma*

In February of 1971, witnesses subpoenaed to appear before a federal grand jury refused to answer questions, asserting their fifth amendment privilege against self-incrimination.[91] Anticipating the witnesses' refusal to testify, the government had previously obtained an order from the district court granting the witnesses use immunity pursuant to 18 U.S.C. §§ 6002-6003.[92] Despite immunity grants, the witnesses persisted in their refusal to testify and were adjudged in contempt.[93] The Court

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39 (7th Cir. 1971). *See also* United States v. Cropper, 454 F.2d 215, 218 (5th Cir. 1971) (use immunity provision insufficient); *In re* Kinoy, 326 F. Supp. 407, 419 (S.D.N.Y. 1971), *noted in* 24 VAND. L. REV. 815 (1971).

The Supreme Court had granted certiorari in Piccirillo v. New York, 400 U.S. 548 (1971), apparently to resolve the issue of whether "transactional" immunity or "use and derivative use" immunity is constitutionally required. But in a per curiam opinion the Court once again evaded the issue and dismissed on an improvident grant of certiorari. *Id.* at 549. The dissenters argued that transactional immunity provides the minimal constitutional guarantee. Mr. Justice Brennan stated that "the Fifth Amendment's privilege against self-incrimination requires that any jurisdiction that compels a man to incriminate himself grant him absolute immunity under its laws from prosecution for any transaction revealed in that testimony." *Id.* at 562 (Brennan, J., dissenting). Viewing the protection of transactional immunity as providing a balance between the privilege and the use and derivative use immunity standard, Justice Brennan continued:

> [T]ransactional immunity . . . steers a well conceived middle path between, on the one hand, a position that no immunity statute can supplant the constitutional privilege and, on the other, a position that affords the individual the altogether too narrow protection of use immunity as applied to the very government that has compelled him to incriminate himself . . . .

Id.

[91] *See* Kastigar v. United States, 406 U.S. 441, 442 (1971).

[92] *See id.* See notes 88 & 89 and accompanying text *supra*. The statute provides immunity from use or derivative use of compelled testimony against the witness in any criminal case, "except a prosecution for perjury, giving a false statement or otherwise failing to comply with the order." 18 U.S.C. § 6002 (1976). It is well-settled that false declarations knowingly made during otherwise immunized testimony are not protected and may be the basis of prosecution for perjury. United States v. Anzalone, 555 F.2d 317, 320 (2d Cir. 1977); United States v. Patrick, 542 F.2d 381, 385 (7th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977); *In re* Bonk, 527 F.2d 120, 125 (7th Cir. 1975); United States v. Tramunti, 500 F.2d 1334, 1344 (2d Cir. 1974); United States v. Hockenberry, 474 F.2d 247, 249 (3d Cir. 1973).

[93] *See* 406 U.S. at 442. The contempt order was issued pursuant to 28 U.S.C. § 1826 (1976). 406 U.S. at 442 n.1. Under this statute, a noncomplying witness may be summarily confined until he consents to answer the grand jury's questions. The period of confinement is not to exceed the termination of the court proceedings, or the grand jury term. Such a contempt order has been held not to violate the witness' constitutional rights. Andretta v. United States, 530 F.2d 681, 684 (6th Cir. 1976) (court relied directly on ruling in *Kastigar*). It should be noted that a grant of immunity has been deemed to carry over to the succeeding grand jury term, thus making it unnecessary to secure a new order for an immunized witness to testify. *See* United States v. Weir, 520 F.2d 662, 665-66 (9th Cir. 1975) (given immunity for first grand jury, witness properly refused to answer identical question propounded by succeeding grand jury).

of Appeals for the Ninth Circuit affirmed the contempt order,[94] and the United States Supreme Court granted certiorari to determine whether the immunity grant was constitutionally sufficient.[95]

In *Kastigar v. United States*,[96] the Court upheld the constitutionality of immunity statutes generally.[97] Construing the dictates of *Counselman* narrowly,[98] the Court announced that use and derivative use immunity affords protection "coextensive with the scope of the privilege against self-incrimination,"[99] which is "sufficient to compel testimony over a claim of the privilege."[100]

After resolving the problematic intrajurisdictional remnants[101] of

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[94] Stewart v. United States, 440 F.2d 954, 957 (9th Cir. 1971), *aff'd sub nom.* Kastigar v. United States, 406 U.S. 441 (1972).

[95] Kastigar v. United States, 402 U.S. 971 (1971).

[96] 406 U.S. 441 (1972). The *Kastigar* decision caused a great stir among proponents of transactional immunity. The controversy involved two issues: the possibility of prosecutorial abuse and the defendant's difficulty in proving that any evidence used against him in a subsequent action is not derived from an independent source. See notes 101 through 104 and accompanying text *infra*. *See generally* M. FRANKEL & G. NAFTALIS, *supra* note 11, at 127-28; Sugar, *Federal Witness Immunity Problems and Practices Under 18 U.S.C. §§ 6002-6003*, 14 AM. CRIM. L. REV. 275, 292-98 (1976); Note, *supra* note 69, at 116-17; Note, *The End of Transactional Immunity: A Rip In Our Constitutional Fabric*, 42 U.M.K.C.L. REV. 258, 262-64 (1974); 43 MISS. L.J. 548, 551-52 (1972); 27 SW. L.J. 517, 522-24 (1973). Other commentators have analyzed the protections afforded by other constitutional provisions. *E.g.*, Note, *Fourth Amendment Protection For a Grand Jury Witness*, 10 AM. CRIM. L. REV. 881 (1972).

[97] The Court had previously upheld the constitutional sufficiency of transactional immunity statutes. *E.g.*, Ullman v. United States, 350 U.S. 422, 424 (1956); Brown v. Walker, 161 U.S. 591, 594 (1896); *see* 406 U.S. at 448 & n.22 (Court refused to reconsider *Ullmann* and *Brown*).

In a case decided the same day, Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472 (1972), the Court considered a similar situation arising under a state statute. The Court announced in this decision that the holding of *Kastigar* applies by reference to the states. *Id.* at 475-76.

[98] Announcing that the *Kastigar* rule is "consistent with the conceptual basis of *Counselman*," the Court stated that "[t]he broad language in *Counselman* . . . was unnecessary to the Court's decision, and cannot be considered binding authority." 406 U.S. at 453-55.

[99] *Id.* at 454.

[100] *Id.* The Court stated that "[t]ransactional immunity . . . affords the witness considerably broader protection than does the Fifth Amendment privilege." *Id.* at 453; *see* United States v. De Diego, 511 F.2d 818 (D.C. Cir. 1975). In *De Diego* the court stated that a grant of immunity broader than the fifth amendment privilege could infringe "upon the great common law principle that 'the public has a right to every man's evidence' " as well as upon "the right of another sovereignty, whether the Federal Government or another State, to enforce its laws." *Id.* at 822.

[101] Although the *Murphy* Court had solved the interjurisdictional immunity problem, the Court seemed uncertain in situations where the questioning and prosecuting jurisdiction are the same. See notes 80 through 87 and accompanying text *supra*. The *Kastigar* decision provided the solution by upholding use-derivative use immunity in an intrajurisdictional context. 406 U.S. at 457-60.

Murphy, the Court turned to the problem of "tainted" evidence.[102] Rejecting the contention that an immunized witness is "dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities,"[103] the Court stated that the government has an affirmative duty to prove that its evidence is derived from a legitimate source, wholly independent of the compelled testimony.[104] Over the firm dissenting opinions of Justices Douglas and Marshall,[105] the majority thus fashioned a use immunity standard which places restrictions upon the government while recognizing the absolute necessity of expediency in gathering information. Bolstered by an analogy to the proscriptive coerced confessions rule,[106] the *Kastigar* majority asserted that the use restriction provides "a comprehensive safeguard" for the protection of

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[102] The problem of subsequent use of compelled evidence, especially in dealing with a single jurisdiction, was of great concern to Justice Brennan in his dissenting opinion in Piccirillo v. New York, 400 U.S. 548, 552 (1971) (per curiam) (*cert. dismissed*). As stated by Mr. Justice Brennan:

> [A]ll the relevant evidence will obviously be in the hands of the government—the government whose investigation included compelling the individual involved to incriminate himself. Moreover, this argument does not depend upon assumption of misconduct or collusion among government officers. It assumes only the normal margins of human fallibility. Men working in the same office or department exchange information without recording carefully how they obtained certain information; it is often impossible to remember in retrospect how or when or from whom information was obtained.

Id. at 568 (Brennan, J., dissenting). This argument is typical of protransactional immunity commentators. See note 96 *supra*.

For academic commentary on proposals and solutions to use of "tainted" evidence, see Note, *supra* note 22, at 649-64; Note, *Kastigar v. United States: The Required Scope of Immunity*, 58 VA. L. REV. 1099, 1115-17 (1972); Note, *supra* note 49, at 181, 188.

[103] 406 U.S. at 460.

[104] *Id.* This affirmative duty language constructs a heavy prosecutorial burden of proof that has been consistently followed by lower federal courts. *E.g.*, United States v. Anzalone, 555 F.2d 317, 320 (2d Cir. 1977); United States v. Frumento, 552 F.2d 534, 542 (3d Cir. 1977); Block v. Consino, 535 F.2d 1165, 1169 (9th Cir.), *cert. denied*, 429 U.S. 961 (1976); United States v. Kurzer, 534 F.2d 511, 517 (2d Cir. 1976); United States v. Seiffert, 463 F.2d 1089, 1092 (5th Cir. 1972); *In re* Minkoff, 349 F. Supp. 154, 157 (D.R.I. 1972). However, in a prosecution for perjury committed in an otherwise immunized statement, introduction into evidence of that portion of the statement essential to establish the corpus delicti is allowed. United States v. Hockenberry, 474 F.2d 247, 249 (3d Cir. 1973).

[105] Justice Douglas focused his dissent upon a criticism of Justice Powell's reading of precedent. 406 U.S. at 462-67 (Douglas, J., dissenting). The dissenting opinion of Justice Marshall was launched at the problem of "tainted" evidence and the majority's analogy to coerced confessions. 406 U.S. at 467-71 (Marshall, J., dissenting).

[106] *Id.* at 461-62. For critical commentary on the coerced confessions analogy, see *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 181, 187 n.40 (1972) (author indicates trouble spots in applying coerced confessions standards to immunity questions); Note, *supra* note 102, at 1113-15 (author questions validity of the analogy); Note, *supra* note 49, at 175-81 (comparative analysis of the two rules discussing the inadequacy of the coerced confessions exclusionary rule in the immunity area).

immunized witnesses.[107] Although the grant of immunity is not available to requesting defense witneses,[108] the *Kastigar* decision clarified the general standards governing immunity legislation[109] and has been consistently followed in the lower federal courts.[110]

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[107] The Court stated that the "use/derivative use" restriction bars use of compelled testimony as an investigatory lead and forecloses the possibility of use of evidence derived from an investigation prompted by prior immunized testimony. 406 U.S. at 460. Even so, the possibility of "non-evidentiary" uses of compelled testimony raises problems recognized by commentators and the lower courts. *See* United States v. Henderson, 406 F. Supp. 417, 428 n.19 (1975) (discussion of conflicting language in *Kastigar* related to evidentiary and nonevidentiary use of testimony and citation of cases considering same). A prosecutor may inadvertently use or be unconsciously affected by the compelled testimony in "his decision to put a witness under special scrutiny during an investigation, to initiate a prosecution, to refuse to engage in plea bargaining, or to structure his general trial strategy." *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 181, 186-87 (1972).

Similar language appears in United States v. McDaniel, 482 F.2d 305, 312 (8th Cir. 1973) (court found a presumption of use or derivative use of compelled testimony since the prosecution had seen the transcript of compelled testimony). It would seem that in order to be constitutionally sufficient, the immunity must forbid all prosecutorial use of testimony compelled directly or indirectly. *Cf.* United States v. Meyers, 339 F. Supp. 1154, 1160-61 (E.D. Pa. 1972) (prosecutorial knowledge of small portion of compelled testimony obtained through newspaper account did not warrant dismissal where independent source was shown). *But see* United States v. Bianco, 534 F.2d 501, 511 n.14 (2d. Cir.) (Bianco's contention that trial was prejudiced by prosecutor's reading of immunized testimony prior to trial was deemed meritless), *cert. denied*, 429 U.S. 822 (1976). *See generally* Sugar, *supra* note 96, at 282-87; Thornburgh, *Reconciling Effective Federal Prosecution and the Fifth Amendment: "Criminal Coddling," "The New Torture" or "A Rational Accomodation?,"* 67 J. CRIM. L. & CRIMINOLOGY 155, 161-64 (1976).

[108] The government is not required to grant immunity to prospective witnesses for a defendant. United States v. Niederberger, 580 F.2d 63, 67 (3d Cir. 1978); United States v. Bautista, 509 F.2d 675, 677 (9th Cir.), *cert. denied*, 421 U.S. 976 (1975); United States v. Jenkins, 470 F.2d 1061, 1063 (4th Cir. 1972), *cert. denied*, 411 U.S. 920 (1973). Moreover, the courts have consistently refused to grant immunity orders requested by the defense. Thompson v. Garrison, 516 F.2d 986, 988 (4th Cir.), *cert. denied*, 423 U.S. 933 (1975); United States v. Allstate Mortgage Corp., 507 F.2d 492 (7th Cir. 1974), *cert. denied*, 421 U.S. 991 (1975). However, the courts have recognized serious due process problems in the disparate treatment of defendants. United States v. Alessio, 528 F.2d 1079, 1089-92 (9th Cir. 1976); Earl v. United States, 361 F.2d 531, 534 n.1 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967). *See generally* M. FRANKEL & G. NAFTALIS, *supra* note 11, at 78-81; Sugar, *supra* note 96, at 298-301; Comment, *Right of the Criminal Defendant to the Compelled Testimony of Witnesses*, 67 COLUM. L. REV. 953 (1967).

[109] The decision prompted reevaluation of similar statutory schemes. *See generally* Comment, *Constitutional Considerations of Federal and State Testimonial Immunity Legislation*, 36 LA. L. REV. 214 (1976).

[110] *E.g.*, United States v. Moss, 562 F.2d 155, 163 (2d Cir. 1977); United States v. Frumento, 552 F.2d 534, 542 (3d Cir. 1977); United States v. Patrick, 542 F.2d 381, 385 (7th Cir. 1976), *cert. denied*, 430 U.S. 822 (1977); *In re* Inzirillo, 542 F.2d 90, 91 (1st Cir. 1976); Block v. Consino, 535 F.2d 165, 168-69 (9th Cir.), *cert. denied*, 429 U.S. 861 (1976); *In re* Bonk, 527 F.2d 120, 124-25 (7th Cir. 1975); Matter of Grand Jury, 524 F.2d 209, 219 (10th Cir. 1975); *In re* Liddy, 506 F.2d 1293, 1301-02 (D.C. Cir. 1974); Goldberg v. Weiner,

C. *Federal Witness Immunity Statutory Procedure*

Any grant of immunity under the federal Act[111] must be ordered by the district court, upon written request from the United States Attorney for the district in which the proceeding is being held.[112] Since the authority to request immunity is vested exclusively in the United States Attorney,[113] a district court is powerless to grant immunity either on its own

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480 F.2d 1067, 1069-71 (9th Cir. 1973); Goldberg v. United States, 472 F.2d 513, 575 (2d Cir. 1973); United States v. Seiffert, 463 F.2d 1089, 1091 (5th Cir. 1972).

[111] 18 U.S.C. §§ 6001-6005 (1976). The Act was based on a model developed by the National Commission on Reform of Federal Criminal Laws. Kastigar v. United States, 406 U.S. 441, 452 n.36 (1972) (the Commission's recommendation served as a model).

The sections dealing with immunity for grand jury witnesses, §§ 6002 and 6003, read as follows:

> § 6002. Immunity generally.
>
> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
>
> (1) a court or grand jury of the United States
>
> (2) an agency of the United States, or
>
> (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,
>
> and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.
>
> § 6003. Court and grand jury proceedings.
>
> (a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.
>
> (b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—
>
> (1) the testimony or other information from such individual may be necessary to the public interest; and
>
> (2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

18 U.S.C. §§ 6002-6003 (1976).

[112] 18 U.S.C. § 6003(a) (1976).

[113] The United States Attorney has seemingly limitless power in witness immunity

motion[114] or at the witness' request.[115] Additionally, the grant must be approved by an official of the Department of Justice,[116] and the grant must be "necessary to the public interest."[117] Before an immunity grant is considered, the witness must have either refused to testify or be likely to refuse to testify on the basis of the privilege against self-incrimination.[118]

Refusal to testify can result in either criminal or civil contempt

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matters. Accordingly, courts have recognized that they are without discretion to deny technically adequate immunity requests. *See* United States v. Leyva, 513 F.2d 774, 776 (5th Cir. 1975) (judge has no discretion to deny an immunity order); Urasaki v. United States District Court, 504 F.2d 513, 514 (9th Cir. 1974) (in passing upon an immunity application the court is confined to procedural and substantive requirements of authorizing statute); *In re* Kilgo, 484 F.2d 1215, 1219 (4th Cir. 1973) (General Immunity Act of 1970 did not authorize federal district court to review United States Attorney's judgment).

The Department of Justice requires the United States Attorney to answer eleven general questions concerning the decision to seek an immunity grant:

1. Relative importance of the witness in criminal activity in the area.
2. Pertinent Federal and local offices have been notified. (Check box)
3. Are any current Federal or local charges pending against witness? If so, give details.
4. If witness is presently incarcerated, state circumstances.
5. Give brief resume of background of case or proceedings.
6. Witness' part in the case or matter under investigation.
7. Summary of the witness' anticipated testimony or information.
8. How testimony or information sought may be necessary to the public interest.
9. Why witness is likely to invoke Fifth Amendment privilege.
10. Is witness likely to testify or produce information if immunity is granted?
11. What Federal or state offenses on the part of the witness may be disclosed if the witness testifies under a grant of immunity?

"Request for Immunity Authorization," Form U.S.A.—167, *reprinted in* Note, *Federal Witness Immunity Problems and Practices Under 18 U.S.C. §§ 6002-6003*, 14 Am. Crim. L. Rev. 275, 294 n.103 (1976).

[114] Thompson v. Garrison, 516 F.2d 986, 988 (4th Cir.) (a district judge is not authorized to initiate immunity for a witness), *cert. denied*, 423 U.S. 933 (1975); United States v. Jenkins, 470 F.2d 1061, 1063 (9th Cir. 1972) (trial court has no power to grant immunity), *cert. denied*, 411 U.S. 920 (1973).

[115] United States v. Bautista, 509 F.2d 675, 677 (9th Cir.) (not required to grant immunity to prospective witness of defendant), *cert. denied*, 421 U.S. 976 (1975); United States v. Ramsey, 503 F.2d 524, 532 (7th Cir. 1974) (no constitutional right to have immunity conferred upon a defense witness), *cert. denied*, 420 U.S. 932 (1975).

[116] The statute spells out that a United States Attorney must have the approval of the "Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General." 18 U.S.C. § 6003(b) (1976). It is the Assistant Attorney General in charge of the Criminal Division who has been authorized to grant requests for immunity orders. 28 C.F.R. § 0.175 (1978).

[117] 18 U.S.C. § 6003(b)(1) (1976).

[118] *Id.* § 6003(b)(2).

proceedings against the immunized witness.[119] In civil contempt proceedings, the witness may be confined for as long as eighteen months[120] if he refuses to testify in compliance with the court order.[121]

In any subsequent prosecution, section 6002 of title 18 of the United States Code only prevents the testimony of the witness from being used;[122] the crime itself is not protected from prosecution so long as the immunization of the testimony is honored.[123] In any such subsequent prosecution, courts frequently use a special pretrial evidentiary hearing to determine if the prosecutor has made any derivative use of previously immunized testimony.[124] The burden is on the prosecution to show by a preponderance of the evidence that the evidence to be presented at trial came from legitimate independent sources.[125] Not only is the prosecution precluded from derivative use, it has even been prevented from nonevidentiary use of the immunized testimony as background information in preparation for a subsequent trial.[126]

The use of immunized testimony is not prohibited in noncriminal proceedings. Since the scope of protection under 18 U.S.C. § 6002 is coextensive with the fifth amendment privilege against self-incrimination,[127] and since the fifth amendment only protects testimony

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[119] Criminal contempt charges may be brought under *id.* § 3691. Civil contempt proceedings should be brought pursuant to 28 U.S.C. § 1826 (1976).

[120] 28 U.S.C. § 1826 (1976). A grand jury witness has been confined for more than fourteen months for his refusal to testify. United States *ex rel.* Womack v. United States Attorney, 348 F. Supp. 1331, 1332 (N.D. Ill. 1972).

[121] 28 U.S.C. § 1826(a) (1976).

[122] 18 U.S.C. § 6002 (1976). This section does point out, however, that immunized testimony may be used in showing perjury, giving a false statement, or showing failure to comply with the immunity order.

[123] The United States Supreme Court has stated: "The statute, like the Fifth Amendment, grants neither pardon nor amnesty. Both the statute and the Fifth Amendment allow the government to prosecute using evidence from legitimate independent sources." Kastigar v. United States, 406 U.S. 441, 461 (1972). See notes 96 through 104 and accompanying text *supra.*

[124] *E.g.*, United States v. Frumento, 522 F.2d 534, 542 n.14 (3d Cir. 1977); United States v. First W. State Bank, 491 F.2d 780, 787 (8th Cir.), *cert. denied,* 419 U.S. 827 (1974); United States v. McDaniel, 482 F.2d 305, 311 (8th Cir. 1973).

[125] *See* United States v. Seibert, 501 F.2d 974, 982 (5th Cir. 1974) (the "preponderance of the evidence" was the standard of proof for any evidentiary hearing). *But see* United States v. Henderson, 406 F. Supp. 417, 423 (D. Del. 1975) (court used "proof beyond a reasonable doubt" for the purposes of argument). See notes 103 & 104 and accompanying text *supra.*

[126] United States v. McDaniel, 482 F.2d 305, 312 (8th Cir. 1973). In *McDaniel,* the Eighth Circuit vacated the conviction of a previously immunized witness, stating that the mere pretrial reading of the defendant's grand jury testimony by the prosecutor was impermissible even though the evidence at trial appeared to have come from independent, legitimate sources. *Id.* at 312.

[127] See notes 98 through 100 and accompanying text *supra.*

which might subject a witness to criminal liability, it follows that immunized testimony is afforded no protection in any civil action.[128]

III. Witness Immunity in Mississippi

In contrast to the clarity and effectiveness of federal witness immunity legislation, Mississippi's immunity statutes are overly broad, inconsistent, and obsolete. First, there is no general immunity statutory scheme that enables the state to compel incriminating testimony in all criminal proceedings. Instead, the various statutes apply only to testimony given in the investigation of specified criminal activities. Moreover, many activities to which the statutes apply, such as violations of liquor laws, gambling laws, and dueling laws, are infrequently the subject of current criminal investigations. The scope of the statutes ranges from grants of transactional immunity[129] to use immunity[130] to a hybrid form, which authorizes both transactional and use immunity grants in the same proceeding.[131] Finally, most of the statutes grant automatic

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[128] Patrick v. United States, 524 F.2d 1109, 1118-21 (7th Cir. 1975) (fifth amendment privilege does not afford protection from civil liability); United States v. Cappetto, 502 F.2d 1351, 1359 (7th Cir.) (in a civil case testimony previously given under a grant of immunity may be used), *cert. denied*, 420 U.S. 925 (1975). *But see* United States v. Braasch, 505 F.2d 139, 146 (7th Cir. 1974) (immunity order issued to prohibit use of immunized testimony in a liquor license revocation proceeding), *cert. denied*, 421 U.S. 910 (1975).

[129] Miss. Code Ann. § 49-5-49 (1972) (person called to testify concerning protection of wild animals, birds, or fish "shall not thereafter be prosecuted for any offense concerning which he is so called upon to give such testimony"); *id.* § 71-5-141 (person testifying about unemployment compensation shall not be "prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination"); *id.* § 97-9-21 (persons testifying concerning violations of champerty and maintenance laws are not subject to prosecution, penalty, or forfeiture relating to their testimony); *id.* § 97-31-51 (person testifying about violations of intoxicating beverage offenses shall not be "prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify"); *id.* § 99-17-23 (person's testimony concerning dueling "shall be a bar to any prosecution against him for such transaction"); *id.* § 99-17-27 ("no person shall be prosecuted or subject to any penalty or forfeiture" because of his testimony relating to violation of gambling laws); *id.* § 99-17-29 (purchaser of a lottery ticket who testifies against the seller is "exempted from prosecution for buying or having the same").

[130] *Id.* § 99-17-31 (witness' testimony concerning offenses affecting the legislature "shall not thereafter be used against him in any criminal prosecution"); *id.* § 99-27-45 ("no disclosure or discovery made by [a witness who testifies about violations of intoxicating beverage laws] is to be used against him in any criminal or penal prosecution").

[131] Act of March 4, 1977, 1977 Miss. Laws, ch. 320, § 1, *reprinted in* Miss. Code Ann. (Supp. 1977) (witness before Sovereignty Commission "shall not be held to answer criminally . . . nor shall any statement made or book, paper or document produced . . . be competent evidence in any criminal proceeding against such witness"); Miss. Code Ann. § 5-1-25 (1972) (same provision with respect to witness before either house of the legisla-

immunity from prosecution to a witness who is merely called by the state to testify.[132] The state's power to compel testimony therefore completely displaces its power to prosecute.

The Mississippi Supreme Court has dealt only peripherally with the immunity issue in recent opinions.[133] Most of the significant decisional law was developed in early cases involving liquor law violations.[134] An analysis of these cases reveals the court's reluctance to restrict overly broad grants of immunity to witnesses, even when the scope of the immunity far exceeds its purpose.[135] Conceptually, the court has frequently blurred the distinction between the constitutional privilege against self-incrimination and the statutory immunity from prosecution, thereby increasing confusion in the immunity area.[136]

The Mississippi Constitution provides: "In all criminal prosecutions the accused . . . shall not be compelled to give evidence against himself . . . ."[137] Despite the broader language of the Mississippi privilege, the Mississippi Supreme Court has held that it affords no greater protection than the fifth amendment.[138] Thus, only testimonial disclosures[139] that might subject the witness to criminal responsibility[140] are

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ture); *id.* § 5-3-19 (same provision with respect to witness before the General Legislative Investigating Committee); *id.* § 75-21-27 (witness' testimony regarding antitrust violations "shall not be used in any prosecution or proceeding, civil or criminal, against the [witness]"); *id.* § 87-1-27 ("any discovery made by a witness upon [testifying about gambling and future contracts] shall not be used against him in any penal or criminal prosecution, and he shall be altogether pardoned of the offense so done or participated in by him").

[132] The only statute that requires an express claim of the privilege against self-incrimination as a prerequisite to immunity from prosecution is MISS. CODE ANN. § 75-5-141 (1972). See note 130 *supra.* Three statutes, however, limit immunity grants to a person who testifies "without procurement or contrivance on his part." Act of March 4, 1977, 1977 Miss. Laws, ch. 320, § 1, *reprinted in* MISS. CODE ANN. (Supp. 1977) (witness before Sovereignty Committee); MISS. CODE ANN. § 5-1-25 (1972) (witness before either house of legislature); *id.* § 5-3-19 (witness before General Legislative Investigating Committee).

[133] *See* King v. State, 363 So. 2d 269, 274 (Miss. 1978) (reversed murder conviction because of nondisclosure of "unauthorized" grant of transactional immunity to key prosecution witness); McCrory v. State, 342 So. 2d 897, 901 (Miss. 1977) (Patterson, C.J., specially concurring) (agreeing with majority's affirmance of contempt conviction for refusal to provide handwriting exemplars, the Chief Justice noted that he did "not wish to be understood as passing upon or adjudicating the greater question of McCrory's immunity").

[134] See cases cited in notes 158 through 169 and accompanying text *infra.*

[135] *Cf.* State v. Billups, 179 Miss. 352, 363, 174 So. 50, 51 (1937) (noting that the immunity statute goes beyond the Bill of Rights).

[136] See notes 179 through 186 and accompanying text *infra.*

[137] MISS. CONST. art. 3, § 26.

[138] McCrory v. State, 342 So. 2d 897, 900-01 (Miss. 1977).

[139] *Id.* (privilege does not prevent state from requiring handwriting exemplars).

[140] State v. Bates, 187 Miss. 172, 181, 192 So. 832, 835 (1940). The privilege is available in "all proceedings sanctioned by law and to any investigation, ex parte or otherwise,

protected. Also, like the fifth amendment, Mississippi's privilege applies only to natural persons,[141] is personal,[142] and must be claimed.[143]

In most Mississippi grand jury proceedings, the privilege cannot be supplanted by a grant of immunity. Thus, the state cannot compel incriminating testimony. In certain isolated investigations,[144] however, the legislature has authorized witness immunity grants. Each of Mississippi's immunity statutes completely supplants the privilege against self-incrimination by providing that a witness cannot refuse to testify.[145] Statutorily stripped of both federal and state constitutional protection, the witness is then automatically clothed with absolute immunity from prosecution by twelve of the fourteen statutes.[146] Although these broad grants of immunity do not contravene the dictates of the United States Supreme Court,[147] they do impede the state's prosecutorial interests. For example, in *Wheat v. State,*[148] a conviction for embezzlement of state funds was reversed because the defendant had previously testified before the Legislative Gasoline Investigating Committee.[149] The immunity statute granted transactional immunity to a witness "for any fact or act touching which he is required to testify" before the committee, and use immunity extending to any statement, book, document or paper produced by the witness.[150] In a vigorous dissent, Justice Alexander stated:

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litigious or not." Bailey v. Muse, 227 Miss. 51, 68, 85 So. 2d 918, 923 (1956).

[141] *See* Cumberland Tel. & Tel. Co. v. State, 98 Miss. 159, 168, 53 So. 489, 490-91 (1910) (noting that corporations cannot claim the privilege, the court nevertheless held the corporation immune from "prosecution, pain, penalty, [or] forfeiture" for evidence compelled by a subpoena duces tecum).

[142] Brown v. State, 108 Miss. 46, 50, 66 So. 288, 288 (1914).

[143] *Id.* It is the trial court's duty to apprise the witness of his right to remain silent. Hutchins v. State, 212 Miss. 145, 151-52, 54 So. 2d 210, 211 (1951); Brown v. State, 108 Miss. 46, 50, 66 So. 288, 288 (1914); Ivey v. State, 84 Miss. 264, 267, 36 So. 265, 266 (1904).

[144] These investigations include those concerning violations of laws relating to wildlife protection, unemployment compensation, champerty and maintenance, gambling and future contracts, purchase of lottery tickets, intoxicating beverages, dueling, antitrust regulations, and offenses against the legislature. Also, persons called to testify before either house of the legislature, the Sovereignty Committee, and the General Legislative Investigating Committee are statutorily immunized. See notes 129 through 132 and accompanying text *supra.*

[145] See notes 129 through 132 and accompanying text *supra.*

[146] *Id.*

[147] In Kastigar v. United States, 406 U.S. 441, 453 (1972), the Court upheld use and derivative use immunity as constitutionally sufficient, and criticized the wasteful breadth of transactional immunity. However, since transactional immunity affords greater protection than the fifth amendment, there is no constitutional impediment to statutory grants of absolute immunity from prosecution.

[148] 201 Miss. 890, 902, 30 So. 2d 84, 88 (1947).

[149] *Id.* at 896, 30 So. 2d at 85.

[150] *Id.*, 30 So. 2d at 85 (quoting Ch. 224, 1944 Miss. Laws).

> I confess a fear that we have put into the statute more than the Legislature intended. We have, in effect, invested a legislative subpoena with the virtue of an antidote against criminal responsibility, and so charged the committee room with healing atmosphere that a brief exposure thereto will immunize the guilty against the pains of prosecution.
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> . . . .
>
> [T]he appellant here emerged from the committee room unscathed by either accusation or suspicion. He has said nothing that could be borrowed for use in indictment . . . . His answers could have been found in a city directory. He has by his physical presence before the committee been coated with a film of insulation against criminal molestation from any source or for any act he may have committed . . . . Emphasis is shifted from the tendency of testimony to incriminate to the tendency of courts to absolve.[151]

The *Wheat* majority relied upon an earlier decision involving gambling law violations, *State v. Bates.*[152] In *Bates,* the defendant's indictment for operating an illegal lottery was based on documentary evidence obtained from the defendant's secretary by a subpoena duces tecum.[153] The indictment was quashed on the basis that since a statute granted complete immunity to persons compelled to testify or to produce evidence concerning gambling, the grand jury was without power to return the indictment.[154] The supreme court affirmed, noting that immunity statutes are remedial and should be literally construed since the public interest in enforcing laws "exceeds in importance to the community the benefit that would flow from the conviction of a particular defendant of crime."[155]

The court's liberal application of witness immunity grants is perhaps most notable in its early decisions involving violations of intoxicating beverage laws. Section 97-31-51 of the Mississippi Code provides transactional immunity to persons compelled to testify concerning violations of intoxicating beverage laws,[156] whereas section 99-27-45 provides use immunity for such persons.[157] In a series of cases from 1908 to 1956, the court consistently immunized witnesses who testified before

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[151] 201 Miss. at 903-04, 30 So. 2d at 88-89 (Alexander, J., dissenting).

[152] 187 Miss. 172, 186, 192 So. 832, 837 (1940).

[153] *Id.* at 175, 192 So. at 833.

[154] *Id.* at 179, 192 So. at 834.

[155] *Id.* at 183, 192 So. at 836.

[156] MISS. CODE ANN. § 97-31-51 (1972) provides in part: "[N]o person shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence . . . ."

[157] *Id.* § 99-27-45 provides in part: "[N]o disclosure or discovery made by such person is to be used against him in any criminal or penal prosecution for or on behalf of the matters disclosed."

the grand jury.[158] In *Evans v. State*,[159] the defendant was called to testify before the grand jury after he had been convicted in justice court for unlawful possession of intoxicating liquor.[160] On appeal to the circuit court, the defendant was again convicted after a trial de novo, and received the same sentence as in the justice court.[161] The supreme court reversed the conviction on the basis that the defendant's testimony before the grand jury precluded further prosecution for the offense, notwithstanding that he had already been convicted and that the "further prosecution" was an affirmance of the earlier conviction.[162]

Only two restrictions have been placed on immunity grants to witnesses testifying about violations of intoxicating beverage laws. First, the witness must be called by the state to testify.[163] Thus, one who voluntarily testifies on behalf of a defendant is later subject to prosecution based on his own testimony.[164] That a witness has testified voluntarily, however, does not preclude application of the immunity statutes in most cases so long as the witness was called by the state[165] and his testimony was given "without procurement or contrivance."[166] Second, the incriminating evidence must be obtained by a court[167] so that if a

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[158] *E.g.*, Bailey v. Muse, 227 Miss. 51, 64-67, 85 So. 2d 918, 922-23 (1956) (chancery court); Zambroni v. State *ex rel.* Hawkins, 217 Miss. 418, 424, 64 So. 2d 335, 337 (1953); Serior v. Gully, 189 Miss. 558, 560, 198 So. 307, 307 (1940); Evans v. State, 157 Miss. 645, 647-48, 128 So. 737, 738 (1930); Thornton v. State, 143 Miss. 262, 269-70, 108 So. 709, 710-11 (1926); State v. White, 140 Miss. 245, 248, 105 So. 500, 501 (1925); Sudduth v. State, 136 Miss. 742, 749-50, 101 So. 711, 712 (1924); Triplett v. State, 136 Miss. 320, 322, 101 So. 501, 501 (1924); Hosey v. State, 136 Miss. 5, 10, 100 So. 577, 577 (1924); Lucas v. State, 130 Miss. 8, 13, 93 So. 437, 437 (1922); Griffin v. State, 127 Miss. 315, 323-24, 90 So. 81, 82 (1921); Wall v. State, 105 Miss. 543, 547, 62 So. 417, 418 (1913); State v. Bramlett, 47 So. 433, 433 (Miss. 1908).

[159] 157 Miss. 645, 128 So. 737 (1930).

[160] *Id.* at 647, 128 So. at 738.

[161] *Id.*, 128 So. at 738.

[162] *Id.*, 128 So. at 738.

[163] Ivey v. State, 153 Miss. 41, 42, 120 So. 449, 449 (1929); Turnage v. State, 134 Miss. 431, 438, 99 So. 9, 10 (1924).

[164] Ivey v. State, 153 Miss. 41, 42, 120 So. 449, 449 (1929).

[165] *See, e.g.*, Thornton v. State, 143 Miss. 262, 268-69, 108 So. 709, 710 (1925) (defendant deemed immune by virtue of his voluntary appearance before the grand jury where he testified concerning his operation of an illegal still); Turnage v. State, 134 Miss. 431, 437, 99 So. 9, 10 (1924) (dictum) ("It is wholly immaterial whether such testimony be voluntary or under compulsion. If it be voluntary and permitted by the state, the witness is as much entitled to the immunity given by the statute as if his testimony had been given under compulsion."). *But see* Yawn v. State, 220 Miss. 767, 770, 71 So. 2d 779, 780 (1954) (denied immunity to defendant who voluntarily testified in his own behalf in a civil case and was subsequently prosecuted based on his prior testimony for selling liquor).

[166] *See* State v. Billups, 179 Miss. 352, 363, 174 So. 50, 51 (1937) ("If it could be shown that the witness contrived and procured the giving of his testimony in order to avoid criminal prosecution, he would not be protected.").

[167] Cook v. State, 150 Miss. 304, 306, 116 So. 598, 598 (1928).

defendant makes incriminating extrajudicial statements even to an officer of the court, he is subject to prosecution.[168] Despite these two restrictions, the court has routinely given the statutes their broadest literal interpretation, even when it means immunizing some of the largest illegal liquor dealers in the state.[169]

Several statutes provide not only the broad grant of transactional immunity which plagued the court during the prohibition era, but use and derivative use immunity as well.[170] While the latter type does not preclude prosecution based on independently obtained evidence,[171] it is mere surplusage when combined with the broader grant of transactional immunity in a single code provision. In *Griffin v. State,*[172] the court was confronted with two statutes for liquor law violations, one providing transactional immunity,[173] and the second providing use and derivative use immunity.[174] Since the use immunity statute was enacted subsequent to the enactment of the transactional immunity statute, the court addressed the question of whether the earlier statute had been repealed.[175] Interpreting the purposes of the two statutes as "entirely harmonious," the court held that there is no conflict in the two, and that the defendant was therefore immune from prosecution under the broader transactional immunity grant.[176] By examining only the overall purpose of the two statutes, the court failed to distinguish the conflicting standards or means by which the objectives of the statutes are achieved. This failure leaves the constitutional rights of an immunized witness precariously imbalanced. The Mississippi Supreme Court has acknowledged that broad grants of complete immunity go beyond con-

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[168] *Id.*, 116 So. at 598. In *Cook,* the appellant had been subpoenaed and sworn as a witness for the state in the trial of another person. He was interrogated preparatory to trial by the county attorney, who later dismissed the action for failure to elicit sufficient testimony to support a conviction. The appellant was subsequently convicted upon an indictment charging him with violations of the intoxicating beverage law over his claim of statutory immunity. The court stated that the statute "grants, but limits, immunity to those only who 'may testify, or produce evidence, documentary or otherwise, before the grand jury or any other court.' " The court denied the appellant immunity because he had not appeared before either of these tribunals. *Id.*, 116 So. at 598.

[169] *See* Zambroni v. State *ex rel.* Hawkins, 217 Miss. 418, 424, 64 So. 2d 335, 337 (1953) ("Under the express terms of the statute the appellants are entitled to immunity . . . notwithstanding the fact that they are evidently among the largest liquor dealers in the State.").

[170] See note 131 and accompanying text *supra.*

[171] Kastigar v. United States, 406 U.S. 441, 460-61 (1972); Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 n.18 (1963).

[172] 127 Miss. 315, 90 So. 81 (1921).

[173] MISS. CODE ANN. § 97-31-51 (1972).

[174] *Id.* § 99-27-45.

[175] 127 Miss. at 323, 90 So. at 82.

[176] *Id.* at 323-24, 90 So. at 82.

stitutional requirements.[177] Moreover, the United States Supreme Court has held that the most limited use and derivative use immunity is coextensive with the fifth amendment privilege against self-incrimination.[178] Thus, on an interjurisdictional level, a witness may be prosecuted by a sister state or by the federal government, notwithstanding Mississippi's grant of absolute immunity from prosecution.

Perhaps even more fundamental to the conceptual infirmity of Mississippi's immunity legislation is the tendency of the court to blur the distinction between the constitutional privilege against self-incrimination and the statutorily-created immunity from prosecution that is designed to supplant the privilege. In *State v. Milam,*[179] witnesses were told by the district attorney that unless they signed a "waiver of immunity from prosecution," they could not testify.[180] In its discussion of the "constitutional immunity against self-incrimination under section 26 of the Mississippi Constitution," the court repeatedly referred to a waiver of immunity rather than a waiver of the privilege.[181] The distinction between immunity and privilege was likewise obscured in *Kellum v. State,*[182] the most recent decision interpreting Mississippi's immunity legislation. In *Kellum,* the defendant contended that his conviction should be reversed since he was compelled to testify before a legislative committee concerning the crime for which he was indicted.[183] The court agreed, reasoning that the statutory immunity grant precluded prosecution "because section 26 of the Mississippi Constitution gives a citizen the right to refuse to testify against himself in criminal cases."[184] This statement equated the right to immunity, which relates to nonliability, with the privilege not to testify, which relates to noncompellability. As stated by Professor Wigmore:

> "Immunity" signifies the *nonliability for the offense itself;* "privilege" signifies the *noncompellability to speak* about the offense. By an immunity the offender's guilt ceases; under a privilege, it continues. This distinction is commonplace, but the failure to observe it and the improper use of "immunity" and "privilege" as interchangeable terms have rendered some judicial opinions needlessly obscure.[185]

The distinction has likewise been emphasized by the United States

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[177] State v. Billups, 179 Miss. 352, 363, 174 So. 50, 51 (1937).

[178] See notes 96 through 100 and accompanying text *supra.*

[179] 210 Miss. 13, 48 So. 2d 594 (1950).

[180] *Id.* at 22, 48 So. 2d at 594-95.

[181] *Id.* at 23, 48 So. 2d at 595.

[182] 194 So. 2d 492 (Miss. 1967).

[183] *Id.* at 492.

[184] *Id.* at 494.

[185] 8 J. WIGMORE, *supra* note 4, § 2281, at 493. For an example of judicial commingling of immunity and privilege, see Raffel v. United States, 271 U.S. 494 (1926).

Supreme Court: "[T]he privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted. Its sole concern is to afford protection against being 'forced to give testimony leading to the infliction of [criminal] penalties.' "[186] The Mississippi Supreme Court's fusion of the two concepts and its imprecision in terminology further confuses Mississippi's witness immunity laws.

CONCLUSION

Mississippi's witness immunity statutes leave both the state and the witness in a precarious position. Because of the absence of a general witness immunity statute, the state has no power to compel incriminating testimony in most criminal proceedings, regardless of how crucial the testimony may be to the prosecution. If the prosecutor offers immunity without statutory authorization, it is doubtful that a witness would accept the offer; even if the witness accepts, it is questionable whether the unauthorized grant would be upheld. The federal legislation authorizes immunity for government witnesses in all criminal proceedings, but places stringent controls on the prosecutor's discretion. By enacting a general witness immunity statute, Congress has recognized that the need for immunity is most appropriately determined by the judiciary on a case-by-case basis. Perhaps this Comment will alert the Mississippi legislature to the desirability of such action on the state level. If it does, its purpose will have been achieved.

Alan Barner Cameron

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[186] Kastigar v. United States, 406 U.S. 441, 453 (1972).

THE PROPOSED CRIMINAL RULES OF CIRCUIT COURT PRACTICE: A SELECTIVE ANALYSIS

At the June 4, 1977, meeting of the Circuit Judges section of the Mississippi Judicial Conference, Mississippi's circuit court judges voted to approve the Mississippi Uniform Criminal Rules of Circuit Court Practice.[1] Promulgated in reaction to the diversity that had resulted from the use of local rules in each circuit court district, the Uniform Criminal Rules are designed to be used in all circuit court districts in Mississippi.[2] Adopted without the consent of, or even a request of approval from either the legislature or the Supreme Court of Mississippi, the Uniform Criminal Rules have produced a storm of controversy concerning both the rules' substantive content and the constitutional power of the circuit judges to adopt them. For example, the Missisippi Board of Bar Commissioners adopted a resolution urging the circuit judges to amend certain rules.[3] Some of the proposed amendments were passed by the Uniform Criminal Rules Committee of the Circuit Judges Conference in June, 1978.[4] In addition, the Mississippi State Legislature has passed a statute requiring all existing or proposed rules of local courts to be submitted to and approved by the Mississippi Supreme Court before the rules can become effective.[5] To avoid a potential conflict between the legislative and judicial branches of the state government, the circuit court judges agreed at their June, 1978, meeting to submit the Uniform Criminal Rules to the Supreme Court for approval.[6]

This Comment will examine the constitutional grounds upon which the Uniform Criminal Rules were first promulgated, as well as the state legislature's attempt to regulate the lower courts' rulemaking authority. Selected rules will be examined in-depth, including the controversial rule 4.06 which deals with criminal discovery. In order to emphasize the

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[1] Letter from Hon. Joe N. Pigott, Circuit Judge and Chairman of the Circuit Judges Committee on Criminal Rules, to Mississippi attorneys. On file with the *Mississippi Law Journal.* The rules were researched by the Mississippi Judicial College. MISS. UNIF. CRIM. R. CIR. CT. PRAC., Foreword.

[2] MISS. UNIF. CRIM. R. CIR. CT. PRAC., Foreword.

[3] The resolution was adopted at the March 31, 1978, meeting. Letter to the Conference of Circuit Judges from Hon. George H. Van Zant, Executive Director of the Mississippi State Bar. On file with the *Mississippi Law Journal.*

[4] For example, Miss. Unif. Crim. R. Cir. Ct. Prac. 1.02 dealing with arrest without warrants was extensively reworded, but apparently with no intended substantive changes, except possibly to add that a defendant, once arrested, is to be brought before a magistrate "forthwith." *Id.*

[5] S.B. 2764, 1978 Miss. Reg. Sess., was passed by the legislature and approved by the governor. It will be examined in detail in section II *infra.*

[6] The new law requires all existing local rules to be submitted to the supreme court and for the approval process to be completed by December 31, 1978. Otherwise, the rules are to be "abrogated, void and unenforceable from and after" that date. S.B. 2764 § 2.

changes made by the Uniform Criminal Rules in criminal discovery, rule 4.06 will be contrasted with the present procedural rule governing criminal discovery.

I. CONSTITUTIONALITY OF THE RULES

The manner in which the Uniform Criminal Rules were adopted is indicative of the judiciary's continuing assertion of its rulemaking power.[7] In the past, all nonlocal court rules have been authorized by the legislature[8] or approved by the Mississippi Supreme Court.[9] The Uniform Criminal Rules, however, were promulgated by the circuit judges alone, under their claimed inherent rulemaking power.[10] This assertion of rulemaking power emanates from the asserted authority of all judges of the constitutional courts of Mississippi to publish rules of practice and procedure for their own courts.[11] Before considering the validity of this claim of power by the circuit judges, an examination of the history of judicial rulemaking authority in Mississippi is in order[12] since the constitutional basis for adoption of the Uniform Criminal Rules is predicated upon the Mississippi Supreme Court's assertion of its own rulemaking authority in *Newell v. State.*[13]

A. *Newell v. State*

Newell v. State[14] is the seminal case in the area of judicial rulemaking in Mississippi. In *Newell,* the Mississippi Supreme Court invoked its rulemaking power to invalidate a section of the 1972 Mississippi Code that prohibited lower court judges from giving instructions to the jury except upon request of a party to the proceeding.[15] In reaching its holding, the court stated: "The inherent power of this Court to promulgate procedural rules emanates from the fundamental constitutional concept

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[7] *E.g.,* RULES OF THE SUPREME COURT OF MISSISSIPPI, *reprinted in Mississippi Law Journal, Mississippi Attorney's Desk Book* SC-1 to SC-12 (2d ed. 1977).

[8] For example, the Mississippi legislature has authorized the supreme court to prescribe rules governing civil practice in circuit, chancery, and county actions. MISS. CODE ANN. § 9-3-61 (Supp. 1977).

[9] *E.g.,* UNIF. R. CIR. CT. PRACT., *reprinted in Mississippi Law Journal, Mississippi Attorney's Desk Book* CI-1 to CI-7 (2d ed. 1977).

[10] Letter from Hon. Joe N. Pigott, *supra* note 1.

[11] The Uniform Criminal Rules discussed in this Comment apply therefore only to cases to be tried in the circuit courts of Mississippi, and are not intended to govern proceedings in county or justice courts.

[12] For a discussion of the rulemaking authority of the supreme court, *see generally* Franck, *Practice and Procedure in Mississippi: an Ancient Recipe for Modern Reform,* 43 MISS. L.J. 287 (1972).

[13] MISS. UNIF. CRIM. R. CIR. CT. PRAC., Preface; *see* Newell v. State, 308 So. 2d 71 (Miss. 1975).

[14] 308 So. 2d 71 (Miss. 1975), *noted in* 46 MISS. L.J. 849 (1975).

[15] 308 So. 2d at 77-78.

of the separation of powers and the vesting of judicial powers in the courts."[16]

The *Newell* decision rested primarily upon two sections of the Mississippi Constitution of 1890. Section 1 of the constitution[17] divides the powers of the state among three branches of state government, the judicial, legislative, and executive. By separating state governmental powers in this fashion, the constitution necessarily excludes from each branch those powers granted to the others.[18] Since section 144 of the constitution entrusts the judicial powers of Mississippi to the supreme court and other constitutional courts of the state,[19] and since judicial powers include a court's inherent right to regulate its own procedure, the Mississippi judiciary therefore holds the exclusive power to promulgate rules of practice and procedure for Mississippi courts.[20]

The essence of the *Newell* holding, that the judiciary has inherent rulemaking power, is not entirely new in Mississippi. Although the language in the *Newell* opinion is bold and inclusive, indicative of a sharp, clean break with precedent, the holding itself has ample supporting authority in past supreme court cases. In *Southern Pacific Lumber Co. v. Reynolds*[21] the supreme court held that circuit courts have the inherent power to promulgate rules for the efficient handling of their caseloads.[22] The court specifically held: "The phrase 'judicial power' in section 144 of the Constitution includes the power to make rules of practice and procedure, not inconsistent with the Constitution, for the efficient disposition of judicial business."[23] In a case decided the same year, *Gulf Coast Drilling & Exploration Co. v. Permenter,*[24] the court held that

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[16] *Id.* at 76.

[17] MISS. CONST. art. I, § 1.

[18] *Id.* art. I, § 2.

[19] *Id.* art. VI, § 144. The circuit courts are constitutional courts whose jurisdiction is granted by *id.* art. VI, § 156. *See* Southern Pac. Lumber Co. v. Reynolds, 206 So. 2d 334, 335 (Miss. 1968).

[20] The court in *Newell* recognized that the legislature had long been regulating procedure in Mississippi. To promote comity with the legislature and to prevent confusion, the court noted that it would continue to recognize the procedural statutes unless they conflict with constitutional mandates. Newell v. State, 308 So. 2d 71, 78 (Miss. 1975).

[21] 206 So. 2d 334 (Miss. 1968). Southern Pacific Lumber had lost an appeal from the county court to the circuit court when it failed to file assignments of error in the time required by a Jones County Circuit Court rule. *Id.* at 335.

[22] *Id.* at 335.

[23] *Id.* (footnote omitted). As an alternative holding the court cited MISS. CODE ANN. § 1664 (1956) (presently codified at *id.* § 9-1-29 (1972)), which gives the circuit courts and other courts the power to establish "rules and orders for the conducting of suits and pleadings." *Id.* However, as noted in 46 MISS. L.J. 849, 854-55 n.50 (1975), the supreme court omitted the title of the section, "Court to control clerk's office and regulate business," which indicates that the legislative intent was to grant less than sweeping rulemaking powers. The case can be better justified on its constitutional holding.

[24] 214 So. 2d 601 (Miss. 1968).

circuit courts may promulgate rules governing appeals from the Workmen's Compensation Commission.[25] Another case foreshadowing *Newell* is *Matthews v. State,*[26] in which the court refused to follow a statute directing the court to hear a defendant's appeal within ten days of the filing of the record and transcript.[27] The court exercised its constitutional power to make procedural rules to prevent advancement of a specific criminal appeal considered no more important than many others on the court docket.[28]

Since *Newell,* the court has exercised its rulemaking power several times. One of the more notable post-*Newell* cases is *Morea v. State.*[29] In *Morea,* the court deemed section 9-3-41 of the Mississippi Code,[30] which requires a written opinion in all criminal appeals where the possible penalty is ten years or more imprisonment, to be advisory only, ruling that no written opinion is warranted where no issue of law worthy of discussion exists.[31] The Mississippi Supreme Court has not, however, claimed a plenary rulemaking authority over the entire legal system; rather, the court has limited itself to regulating procedure and practice in the courts,[32] thereby avoiding an invasion of the proper policymaking

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[25] *Id.* at 603-04. Again, the appellant had missed a time deadline set by the local court. *Id.* at 602.

[26] 288 So. 2d 714 (Miss. 1974).

[27] *Id.* at 715. The statute was MISS. CODE ANN. § 99-35-145(7) (1972), dealing with writs of coram nobis.

[28] 288 So. 2d at 715. Prior to *Matthews,* however, the court had refused to exercise its rulemaking authority in potentially appropriate cases. For example, in Board of Supervisors v. Bailey, 236 So. 2d 420 (Miss. 1970), the court reversed an order of the circuit court directing the board to pay for legal expenses incurred in defending three misdemeanants and two others acccused of rape whose charges were dropped before indictment. These expenses were not included in the statutory authorization, and the supreme court refused to order payment, considering the matter of payment to be within legislative powers, not judicial. *Id.* at 422. Of similar import is Young v. State, 255 So. 2d 318 (Miss. 1971), which held that the court was without power to increase an attorney's compensation when he was appointed to defend an armed robber. *Id.* at 321-22. *See also* International Shoe Co. v. Garfinkle, 146 Miss. 799, 112 So. 168 (1927), where the court stated: "The legislature is without power to enact rules of practice and procedure which would unduly hamper or impair the administration of justice in such courts. But within that limitation the power of the legislature to enact statutes governing the practice and procedure in the courts, is undoubted." *Id.* at 807, 112 So. at 169-70.

[29] 329 So. 2d 527 (Miss. 1976).

[30] MISS. CODE ANN. § 9-3-41 (1972).

[31] 329 So. 2d at 527-28.

[32] *See, e.g.,* Southern Pac. Lumber Co. v. Reynolds, 206 So. 2d 334, 335 (Miss. 1968) ("judicial power . . . includes the power to make rules of practice and procedure, not inconsistent with the Constitution"). For examples of the court's regulation of practice and procedure, see Brown v. City of Water Valley, 319 So. 2d 649, 650-51 (Miss. 1975) (en banc) (court's rulemaking power extended to writs of certiorari directed to lower court reporters ordering them to prepare the record); Scott v. State, 310 So. 2d 703, 704-05 (Miss. 1975) (approving rule 14 of the Uniform Rules of the Circuit Courts of Mississippi dealing with time deadlines for jury instructions); Haralson v. State, 308 So. 2d 222, 223

powers of the legislature.[33] This restriction on the court's rulemaking power was recognized in *Newell,* where the court noted that it would assert its rulemaking power only to overrule statutes that impede justice or conflict with the constitution.[34] The reasons for this limitation were later explained by Chief Justice Gillespie in his concurrence in *Haralson v. State*[35] where he noted that because of their heavy case load, the Justices of the supreme court could not undertake a comprehensive study of the entire procedural system.[36] He also suggested that procedural modernization could more feasibly be accomplished with legislative cooperation.[37] While the Chief Justice concluded that the supreme court should utilize its rulemaking powers sparingly,[38] he also noted that the court will act where the questioned procedure impedes the judicial function.[39] As recent opinions concerning procedural modernization have shown, the ideas espoused by the Chief Justice in *Haralson* serve as a backdrop against which the court exercises its rulemaking power.[40]

B. Constitutionality of Circuit Court Rules

The holding in *Newell* does not conclusively validate the Uniform Criminal Rules' adoption procedure since the rules were adopted without supreme court approval. Although the Uniform Criminal Rules will be submitted to the supreme court pursuant to legislative plan, the authority of circuit court judges to promulgate their own binding rules of procedure must be examined in order to facilitate an understanding of the rationale behind the circuit judges' adoption procedure.

(Miss. 1975) (noting that MISS. CODE ANN. § 9-13-33 (1972), requiring an appellant to give notice to the court reporter before his appeal is perfected, was an invasion of the court's rulemaking authority).

[33] The policymaking powers are granted to the legislature by MISS. CONST. art. IV, § 33. *See generally* 46 MISS. L.J. 849 (1975).

[34] 308 So. 2d at 76. This was the course of action urged three years earlier in Franck, *supra* note 12, at 308-09. Franck urged the Mississippi Supreme Court to assert its rulemaking power, but not to use it to invalidate existing statutes unless "the administration of justice is impaired." *Id.* at 309. The Franck article was cited by Justice Patterson in the *Newell* opinion. 308 So. 2d at 76.

[35] 308 So. 2d 222, 224-25 (Miss. 1975) (Gillespie, C.J., concurring).

[36] *Id.* at 225.

[37] *Id.* In the civil area this has been accomplished with the passage of MISS. CODE ANN. §§ 9-3-61 to -73 (Supp. 1977), which presents a scheme for approving a new set of civil procedural rules. The supreme court, with help from a staffed advisory committee, will promulgate the rules. The legislature will have veto power before the rules can go into effect. *Id.* A similar suggestion was made in 46 MISS. L.J. 849, 860 (1975) (unified rulemaking body is ideal).

[38] 308 So. 2d at 225.

[39] *Id.*

[40] *See* Brown v. City of Water Valley, 319 So. 2d 649, 651 (Miss. 1975) (court has "inherent power to prescribe rules of procedure to facilitate administration of justice"); Newell v. State, 308 So. 2d 71, 76 (Miss. 1975) (same).

The controversy created by the circuit judges' adoption of the Uniform Criminal Rules boils down to an issue simply stated: do the circuit judges of Mississippi have the constitutional authority as a unified body to adopt independently a uniform set of rules and procedure governing criminal practice in the circuit courts? There is substantial authority implying that the circuit judges are constitutionally empowered to promulgate their own uniform rules. The circuit courts have the authority to draft uniform rules to be approved by the supreme court,[41] and, as settled in *Reynolds,* the constitution grants individual circuit courts the inherent authority to establish local rules.[42] The Mississippi Supreme Court has generally upheld local court rules.[43] Furthermore, the Uniform Rules of Circuit Court Practice have been enforced on occasion by the supreme court. In *Scott v. State*[44] the court upheld a contempt fine against an attorney who had failed to file jury instructions before trial as required by rule 14 of the Uniform Rules.[45] Citing *Newell* and *Reynolds,* the supreme court held that the establishment of the rule was within the inherent judicial power of the circuit court.[46] Furthermore, only one of the two criticisms leveled at procedural reform by Chief Justice Gillespie[47] can be made against the Uniform Criminal Rules. Even though the rules were adopted without the legislative cooperation the Chief Justice felt was preferable,[48] such cooperation, although desirable, is not required. In addition, any charge that the rules are the result of a superficial study[49] is unfounded. The Mississippi Judicial College, funded by state grants, was assigned to research the area and draft suggestions.[50] Several meetings were then held by the Committee on Criminal Rules, chaired by Judge Pigott, at which the rules were discussed and approved subject to subsequent acceptance by the Confer-

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[41] See notes 44 through 46 and accompanying text *infra.*

[42] Southern Pac. Lumber Co. v. Reynolds, 206 So. 2d 334, 335 (Miss. 1968). See notes 21 through 23 and accompanying text *supra.*

[43] *See* Gulf Coast Drilling & Exploration Co. v. Permenter, 214 So. 2d 601, 603-04 (Miss. 1968) (circuit courts have power to regulate appeals from Workmen's Compensation Commission); Southern Pac. Lumber Co. v. Reynolds, 206 So. 2d 334 (Miss. 1968) (circuit courts have authority to promulgate rules of practice and procedure).

[44] 310 So. 2d 703 (Miss. 1975).

[45] *Id.* at 704.

[46] *Id.* at 704-05. The court reached a similar conclusion on Uniform Rule of Circuit Court Practice 13, concerning jury voir dire, in Peters v. State, 314 So. 2d 724 (Miss.), *cert. denied,* 423 U.S. 1019 (1975). The court validated the substantive constitutionality of the rule and stated: "The trial courts have the authority and power to establish reasonable rules to expedite the business of the court." 314 So. 2d at 726. The court cited MISS. CODE ANN. § 9-1-29 (1972), discussed in note 23 *supra,* and the *Reynolds* decision to support its holding. 314 So. 2d at 726.

[47] Haralson v. State, 308 So. 2d 223, 224-25 (Miss. 1975).

[48] *Id.* at 225.

[49] *See id.*

[50] MISS. UNIF. CRIM. R. CIR. CT. PRAC., Preface.

ence of Circuit Court Judges.[51] Based on the amount of time spent by these two organizations in formulating the Uniform Criminal Rules, the rules are the product of thorough research and exhaustive study.

Chief Justice Gillespie, while on the bench, expressed the view that the role of the supreme court in considering rules of local courts would be limited to an approval in principle rather than a scrutiny of each rule.[52] This "approval in principle" without formal submission of the rules seems tantamount to an acceptance of the constitutional authority of the Circuit Judges Conference's power to adopt its own rules independently. Although any question of constitutionality has been avoided since the rules will be submitted to the supreme court formally for approval,[53] the Uniform Criminal Rules can stand on their own constitutional authority under the method of their original adoption.[54]

II. Legislative Response

With the various suggestions for amendments to the Uniform Criminal Rules came legislative action in the form of a bill to regulate procedures for the adoption of local rules. Although as passed by the legisla-

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[51] *Id.*

[52] Letter from Chief Justice Robert G. Gillespie to Hon. Gerald W. Chatham dated February 15, 1977. On file with the *Mississippi Law Journal.*

[53] *See* S.B. 2764, 1978 Miss. Reg. Sess.

[54] It should be noted that Mississippi's judiciary is not the only court to claim an inherent rulemaking power. *See* Heat Pump Equip. Co. v. Glen Alden Corp., 93 Ariz. 361, 380 P.2d 1016, 1017 (1963) (en banc) (courts have inherent rulemaking authority); Adams v. Rubinow, 157 Conn. 150, 251 A.2d 49, 56 (1968) (legislatively enacted court procedural rules not binding without court's acquiescence); R.E.W. Const. Co. v. District Court, 88 Idaho 426, 400 P.2d 390, 397 (1965) (supreme court has inherent power in area of rulemaking for procedure in state courts); Burton v. Mayer, 274 Ky. 263, 118 S.W.2d 547, 549 (1938) (same); Garabedian v. Donald Williams, Inc., 106 N.H. 156, 207 A.2d 425, 426 (1965) (same); State v. Roy, 40 N.M. 397, 60 P.2d 646, 659 (1936) (power to regulate procedure is a judicial power); *In re* Constitutionality of Section 251.18, Wis. Statutes, 204 Wis. 501, 236 N.W. 717, 719-20 (1931) (supreme court, not the legislature, has rulemaking power).

Even the United States Supreme Court has recognized the judicial nature of rules of practice and procedure. *See* Beers v. Haughton, 34 U.S. (9 Pet.) 329, 360 (1835), where Justice Story stated for the Court: "[A] general superintendence over [process and modes of proceeding in a suit] seems to be properly within the judicial province, and has always been so considered . . . ."

The situation of the federal judiciary is not parallel to that of the states, though, since the United States Constitution does not create any court except the Supreme Court. Congress was granted the power to establish the lower courts, and with this power came the power to regulate procedure and jurisdiction. See U.S. Const. art. III, § 1. Because of this constitutioal difference, the federal court system did not assert an independent rulemaking power as many of the states have, but rather waited until Congress granted them this authoity by legislation. *See* 18 U.S.C. § 3771 (1976) (authority to promulgate criminal rules granted to Supreme Court); 28 U.S.C. § 2071 (1976) (general rulemaking authority); *id.* § 2072 (Supreme Court authorized to prescribe rules of civil procedure); *id.* § 2075 (Supreme Court authorized to prescribe bankruptcy rules).

ture and approved by the governor the bill applies to "local" court rules only,[55] its general intent is evidently to include all rules of the various courts of Mississippi, whether of local or statewide application. The new statute will have a considerable effect upon all court rules in Mississippi, including the Uniform Criminal Rules.

A. Provisions

As approved, S.B. 2764 requires that all new local rules or amendments to existing rules of every circuit, chancery, county, youth, or family court be submitted to the supreme court for approval.[56] The supreme court must then mail a copy of the proposed rule or change to every attorney in all counties to be affected, and must wait long enough for objections to be made before approving the rule as presented.[57] The statute also provides that if existing local rules are not submitted for approval under the new procedure, the rules will be void after December 31, 1978.[58]

The new statute, designed to limit local courts' rulemaking authority, has severe drafting problems. While the bill purports to cover only "local" rules,[59] it may be that the legislature intended the bill to cover all uniform rules of practice and procedure in Mississippi. However, solid arguments are not based on speculation about legislative intent. Since the Uniform Criminal Rules are not local in nature but have statewide effect, the term "local," as used in S.B. 2764, arguably excludes the Uniform Criminal Rules from its ambit. Had the legislature intended the bill to cover statewide uniform rules, it could easily have provided explicitly in the statute for their coverage.

Secondly, the bill applies to "rules and amendments thereto governing practices not inconsistent with the laws of the state of Mississippi."[60] This phrase is open to two widely differing interpretations. One interpretation is that only those rules consistent with the Mississippi Code need be presented for approval, while all others are valid without approval. This result was obviously not intended since it would severely diminish the practical importance of the bill. The other interpretation is that only those rules consistent with the code need be presented, while all others are invalid. If this interpretation is correct, the bill directly contradicts *Newell.*

Another major problem with the bill is that it places a financial burden upon the supreme court without providing correlated funding.

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[55] S.B. 2764 § 1, 1978 Miss. Reg. Sess.
[56] *Id.*
[57] *Id.*
[58] *Id.* § 3.
[59] *Id.* § 1.
[60] *Id.*

If the various uniform rules of Mississippi and changes thereto must be approved through this system, the costs of preparing copies of proposals and subsequently mailing them to every member of the state bar will be substantial.

B. Constitutionality

Senate Bill 2764 represents an effort by the Mississippi Legislature to perpetuate the control, exemplified by the statutes governing the adoption of new civil rules,[61] that it has historically exercised over court procedure.[62] Such assertions of legislative power are in direct conflict with the holdings of the supreme court which have repeatedly declared adjective law to be the exclusive province of the judiciary.[63]

Not only is legislative control of rulemaking contrary to the holdings of the supreme court, it is also without constitutional authority—at least insofar as the constitutional courts are concerned.[64] Section 2 of the Mississippi Constitution of 1890 specifically provides: "No person or collection of persons, being one or belonging to one of these departments [judicial, legislative, or executive], shall exercise any power properly belonging to either of the others."[65] Thus, the state constitution[66] prohibits the legislature from exercising any judicial powers, including the rulemaking powers conferred by the constitution,[67] upon the constitutional courts.[68] It follows, therefore, that S.B. 2764 cannot be constitutionally binding on the supreme, circuit, or chancery courts,[69] nor can

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[61] MISS. CODE ANN. §§ 9-3-61 to -73 (Supp. 1977).

[62] *See* Franck, *supra* note 12, at 291-92.

[63] *E.g.*, Morea v. State, 329 So. 2d 527, 527 (Miss. 1975); Brown v. City of Water Valley, 319 So. 2d 649, 650-51 (Miss. 1975); Scott v. State, 310 So. 2d 703, 704-05 (Miss. 1975); Newell v. State, 308 So. 2d 71, 76-77 (Miss. 1975); Southern Pac. Lumber Co. v. Reynolds, 206 So. 2d 334, 335 (Miss. 1968). *Contra,* International Shoe Co. v. Garfinkle, 146 Miss. 799, 807, 112 So. 168, 169 (1927) (legislature has power to enact procedural rules for courts).

[64] MISS. CONST. art. V, § 144 grants the judicial powers of Mississippi to the supreme court and the other courts established by the constitution. *Id.* art. VI, § 172 grants the legislature the power to establish other inferior courts, and this authority allows the legislature to dictate their jurisdiction. Examples of judicial bodies created by the legislature under the authority of this section include the police justices, MISS. CODE ANN. § 3001 (1892) (current version at *id.* § 21-23-1 (1972)), *construed in* Hughes v. State, 79 Miss. 77, 79-80, 29 So. 786, 787 (1901), county courts, 1926 Miss. Laws ch. 131 (current version at MISS. CODE ANN § 9-9-1 (Supp. 1978)), *construed in* State *ex rel.* Knox v. Speakes, 144 Miss. 125, 159-62, 109 So. 129, 133-34 (1926), and mayors as ex-officio justices of the peace, MISS. CODE ANN. § 3001 (1892) (current version at *id.* § 21-23-5 (Supp. 1978)), *construed in* Hathaway v. State, 188 Miss. 403, 409, 195 So. 323, 324 (1940).

[65] MISS. CONST. art. 1, § 2.

[66] "[I]f there be a clash between the edicts of the constitution and the legislative enactment, the latter must yield." Newell v. State, 308 So. 2d 71, 77 (Miss. 1975).

[67] MISS. CONST. art. VI, § 144.

[68] This was the basic holding of Newell v. State, 308 So. 2d 71, 77 (Miss. 1975).

[69] These are all constitutional courts. The supreme court is established in MISS.

the bill validly govern the adoption of the Uniform Criminal Rules.[70]

Despite the constitutional infirmity of S.B. 2764, the Conference of Mississippi Circuit Court Judges has agreed to submit the Uniform Criminal Rules to the supreme court. In view of the judges' unprecedented act of originally promulgating the rules without supreme court approval, the subsequent decision to submit the rules to the high court is somewhat surprising. No doubt the judges were motivated at least in part by a desire for comity with the legislature. Nevertheless, even if the submission is not constitutionally required, once the approval process is completed there should be no doubt concerning the validity of the rules.

III. Specific Rules

A. *Rule 1.01—Arrests with Warrants*

In the development of modern criminal procedural due process, perhaps the area of the most dramatic expansion has been that of search and seizure. Rules 1.01 and 1.02 deal with an aspect of this controversy—the requirement for legal arrest.[71] In this context the crucial issue is not the means by which the defendant came into the court's jurisdiction,[72] rather, it is the admissibility of evidence acquired during the search of the defendant at the time of the arrest.[73] Since probable cause

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Const. art. VI, § 144; the circuit courts are granted jurisdiction in *id.* art. VI, § 156; the chancery courts are granted jurisdiction in *id.* art. VI, § 158.

[70] The same rationale also applies to the new civil rules presently being drafted pursuant to Miss. Code Ann. §§ 9-3-61 to -73 (Supp. 1977). If the rules are rejected in whole or in part, the supreme court, or the lower courts affected, could declare the rules to be effective without legislative approval. This would clearly be an act within the judicial powers of the state. Other factors to be weighed against such action include comity with the legislature and the fact that the legislature must appropriate funds for the judiciary to operate efficiently. While the salaries of the supreme court justices cannot be reduced "during their continuance in office," Miss. Const. art. V, § 166, the legislature can reduce appropriations in other areas.

[71] As their titles indicate, rule 1.01 deals with arrest warrant requirements, while rule 1.02 deals with the criteria that will validate an arrest without a warrant. Miss. Unif. Crim. R. Cir. Ct. Prac. 1.01, 1.02.

[72] Frisbie v. Collins, 342 U.S. 519 (1952). The Court upheld the murder conviction of a defendant, brought into the jurisdiction of the Michigan court by law officers who kidnapped him, on the ground that the Constitution does not require a court to "permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will." *Id.* at 522.

[73] *See, e.g.,* Weeks v. United States, 232 U.S. 383, 398 (1914)(evidence seized in violation of rights inadmissible); Strode v. State, 231 So. 2d 779, 781-82 (Miss. 1970) (reliable informer's tip provided probable cause equal to that necessary to get a warrant to arrest Strode). The search incident to arrest has long been recognized, *see* Weeks v. United States, 232 U.S. 383, 392 (1914) (right to search incident to a legal arrest recognized in dictum). In Chimel v. California, 395 U.S. 752, 762-63 (1969), the Court addressed itself to the purpose of the search, noting that a search incident to arrest is justified to remove any weapons that the person arrested might use to escape and also to remove any destruc-

constitutes a major component in this evidentiary analysis it must be treated in brief overview. Clearly, however, an extensive discussion of probable cause is beyond the scope of this Comment.

Although a valid arrest may be made without a warrant in some circumstances, such arrests are restricted to occasions in which it is impractical to obtain a warrant.[74] In an attempt to establish a fairly simple procedure in an extremely complex area of criminal law, rule 1.01 stipulates both the technical and substantive requirements for an arrest warrant. The rule has been taken almost verbatim from the corresponding provisions of Florida's and Minnesota's criminal rules.[75] Indeed, the wording of the first two paragraphs of the rule is virtually identical to the language of the Minnesota rule.[76] In requiring judicial discretion concerning whether a warrant should be issued, rule 1.01 conforms with the requirements of both the federal rules and those of most other states.[77] The last two paragraphs of rule 1.01 track the language of the Florida rules with some minor modifications.[78] Although other jurisdictions have similar specifications as to form, none dictates such detailed requirements[79] as the Florida and, by derivation, Mississippi rules. For-

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tible evidence from the defendant's control. Noting these two limited purposes, the Court held that the purpose of the search would be fulfilled if the search were limited to the person of the defendant and the area into which he might reach or grab to seize a weapon or evidence. *Id.*

[74] Beck v. Ohio, 379 U.S. 89, 96 (1964) (warrantless arrest held invalid because arresting officers failed to show probable cause); Rothblatt, *The Arrest: Probable Cause and Search Without a Search Warrant,* 35 MISS. L.J. 252, 254 (1964).

[75] FLA. R. CRIM. P. 3.121; MINN. R. CRIM. P. 3.01.

[76] MINN. R. CRIM. P. 3.01. Actually, the Mississippi rule follows the 1976 text of the Minnesota rule. A 1977 amendment deleted the words "or indictment" that appear in paragraph 2, line 3 of the Mississippi rule. MINN. R. CRIM P. 3.01, Advisory Note; *see* Miss. Unif. Crim. R. Cir. Ct. Prac. 1.01.

[77] *See, e.g.,* FED. R. CRIM. P. 4(a); FLA. R. CRIM. P. 3.120; MINN. R. CRIM. P. 3.01. *But see* MO. R. CRIM. P. 21.08 (whenever a sworn complaint alleging a felony is filed in the proper court, "it shall be the duty of the judge or magistrate thereof . . . to issue a warrant"). To comply with fourth amendment standards, the judicial discretion in the Mississippi rule is required. *See, e.g.,* Gerstein v. Pugh, 420 U.S. 103, 112 (1974) ("the existence of probable cause [is required to] be decided by a neutral and detached magistrate whenever possible"); Anthony v. State, 220 So. 2d 837, 840 (Miss. 1969) ("the issue of probable cause is a judicial question to be determined by the judge").

[78] For example, the Mississippi rule omits subdividing the rule into paragraphs (a) and (b). Also, in the last paragraph, the Florida rule reads: "No arrest *warrant* shall be dismissed . . . ." FLA. R. CRIM. P. 3.120 (emphasis added), while the Mississippi rule omits the italicized word, Miss. Unif. Crim. R. Cir. Ct. Prac. 1.01. An amendment was recently proposed to rule 1.01 by the Criminal Law Committee of the Circuit Court Judges, following a suggestion by the Mississippi State Bar. It amends numbered subparagraph (3) by adding at the end of the sub-paragraph the word "forthwith." This proposed amendment should have no substantive effect upon the rule, but should express the command that the defendant not be incarcerated for an unreasonable period of time without being brought before a magistrate.

[79] *See, e.g.,* FED. R. CRIM. P. 4(c); MINN. R. CRIM. P. 3.02, subd. 1; MO. R. CRIM. P. 21.06, 21.08.

tunately, rule 1.01 organizes these detailed requirements into separate numbered elements.[80]

1. Paragraph 1—Probable Cause

Rule 1.01 establishes flexible criteria regarding the extent and nature of information necessary to obtain a warrant from a magistrate. In addition, the rule requires the magistrate to determine the existence of probable cause, the standard for the issuance of a warrant under both the United States Constitution[81] and the Mississippi Constitution.[82] Under rule 1.01 an arrest warrant may be issued only if a magistrate possesses sufficient information to find "probable cause to believe that an offense has been committed and that the defendant committed it."[83] An arrest made without a valid warrant will not prevent the court from acquiring jurisdiction over the defendant.[84] The courts have, however, created a significant deterrent to illegal arrests by making evidence obtained in the course of such an arrest inadmissible in the subsequent trial.[85]

Because the absence of "probable cause" will trigger this rule of evidentiary exclusion, a clear understanding of this term's meaning is essential. Probable cause has been defined as

> a practical, non-technical concept, based upon the conventional considerations of everyday life on which reasonable and prudent men, not

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[80] *See* Miss. Unif. Crim. R. Cir. Ct. Prac. 1.01. The seventh requirement, that of setting a bail amount, is not found in the other rules mentioned in the annotation, except Florida's, nor is it required by the Mississippi statutes. *See* MISS. CODE ANN. §§ 99-13-19, -21, § 99-25-15 (1972). It seems, however, to be a good idea that can be used to allow defendants to get out of jail with a minimum of delay, assuming they are able to post the bond set.

[81] U.S. CONST. amend. IV providies in pertinent part: "[N]o Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing . . . the persons . . . to be seized." This amendment was made applicable to the states through the due process clause of the fourteenth amendment in Mapp v. Ohio, 367 U.S. 643, 656-57 (1961). Before the *Mapp* decision, the Mississippi Supreme Court had held that "[t]he provisions of the Fourth Amendment to the Federal Constitution against unreasonable searches and seizures have no application to state proceedings." Nash v. State, 171 Miss. 279, 282, 157 So. 365, 366 (1934). However, the author of that opinion, Presiding Justice Ethridge, had written that "Section 23 of the Constitution [of 1890] imposes important limitations upon peace officers in making arrests, and in issuing warrants therefor." Ethridge, *The Law of Arrest*, 3 MISS. L.J. 79, 84 (1930). Thus, protections, though perhaps not as broad as today's, did exist in Mississippi arrest law before *Mapp* in 1961.

[82] MISS. CONST. art. III, § 23 provides in pertinent part: "The people shall be secure in their persons . . . from unreasonable search and seizure; and no warrant shall be issued without probable cause, supported by oath or affirmation specially designating . . . the person . . . to be seized."

[83] Miss. Unif. Crim. R. Cir. Ct. Prac. 1.01.

[84] Frisbie v. Collins, 342 U.S. 519, 522 (1952).

[85] Wong Sun v. United States, 371 U.S. 471, 484 (1963).

> legal technicians, act. It arises when the facts and circumstances within an officer's knowledge, or of which he has reasonably trustworthy information, are sufficient to justify a man of average caution in the belief that a crime has been committed and that a particular individual committed it.[86]

The standard for determining probable cause has been described more succinctly as more than "bare suspicion," but less than proof beyond a reasonable doubt.[87]

A warrant is usually requested by means of sworn affidavit or, as rule 1.01 implies, by a complaint.[88] The officer requesting a warrant may provide supplemental sworn testimony to support the finding of probable cause[89] and his affidavit and testimony may include hearsay.[90] As explained in *Aguilar v. Texas*,[91] the purpose of such information is to permit a "neutral and detached magistrate" to determine the existence of probable cause.[92] If an informer is involved, his credibility must be established.[93]

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[86] Strode v. State, 231 So. 2d 779, 782 (Miss. 1970) (citing Brinegar v. United States, 338 U.S. 160, 175 (1949)); *accord*, McCollum v. State, 197 So. 2d 252, 255 (Miss. 1967). This definition applies to the considerations of a magistrate in his determination to issue a warrant as well as to an arrest without a warrant. *Strode* is an example of the definition's application to an arrest without a warrant.

[87] Powe v. State, 235 So. 2d 920, 923 (Miss. 1970) (arrest without a warrant); Rothblatt, *supra* note 74, at 254.

[88] Miss. Unif. Crim. R. Cir. Ct. Prac. 1.01.

[89] Butler v. State, 296 So. 2d 673, 675 (Miss. 1974), *cert. denied*, 422 U.S. 1057 (1975); *see* Pruett v. State, 261 So. 2d 119, 123 (Miss. 1972) (additional testimony may be taken in a search warrant request).

[90] Aguilar v. Texas, 378 U.S. 108, 114 (1964); *see* Pruett v. State, 261 So. 2d 119, 121-22 (Miss. 1972) (similar ruling as to a search warrant); *accord*, O'Bean v. State, 184 So. 2d 635, 638 (Miss. 1967).

[91] 378 U.S. 108 (1964).

[92] *Id.* at 114-15; Rothblatt, *supra* note 74, at 254. Similar opinions were expressed years ago in Ethridge, *supra* note 81, at 84, when Justice Ethridge stated: "[T]he facts constituting probable cause are for judicial decision, and the judgment of the officer is not conclusive." His source for this rule was not the fourth amendment, which at the time was not applied to the states, see note 81 *supra*, but rather section 23 of the Mississippi Constitution of 1890, Ethridge, *supra* note 81, at 84.

Although *Aguilar* involved a search warrant, the reasoning applies equally to arrest warrants. Williams, Williams & Thackston, *The Criminal Versus Society: Some Observations on the Accommodation of Mississippi Criminal Procedure to the Evolving Concepts of "Constitutionalized" Due Process*, 37 MISS. L.J. 353, 363 (1966). The Court in *Aguilar* also spelled out the type of information that must be presented to the magistrate, who must be given the underlying facts and circumstances leading the officer to believe probable cause exists. Aguilar v. Texas, 378 U.S. 108, 114 (1964). *See also* Giordenello v. United States, 357 U.S. 480, 486-87 (1958) (invalidating an arrest warrant because of insufficient underlying facts).

Because of the preferences for a neutral judicial decision on probable cause, the Supreme Court has indicated that an arrest warrant shall be obtained if possible. Beck v. Ohio, 379 U.S. 89, 96 (1964). Of course, if it can be shown that the magistrate issuing the warrant was not neutral, the warrant is invalid. Coolidge v. New Hampshire, 403 U.S. 443, 453 (1971).

[93] Aguilar v. Texas, 378 U.S. 108, 114 (1964). However, the Court noted that only the reliability of the informer, not his identity, need be revealed. *Id.*

Following the precedent of *Aguilar*, the Mississippi Supreme Court in *O'Bean v. State*[94] invalidated a search warrant issued on the basis of a conclusionary affidavit.[95] *O'Bean* enunciated the often cited rule that the affidavit for a warrant must "contain some of the underlying facts or circumstances from which a detached and neutral judge can fairly ascertain that probable cause does exist."[96] This rule has been applied both to search warrants[97] and arrest warrants.[98]

2. Paragraph 2—Who Can Issue a Warrant

In Mississippi, authority to issue warrants is governed by a statutory scheme[99] to which rule 1.01 defers.[100] Sections 99-15-1 and 99-15-5 of the Mississippi Code permit supreme court Justices and chancery and circuit judges to issue warrants throughout the state.[101] County and justice court judges may issue warrants only in their counties.[102] The severity of these territorial limitations is mitigated, however, by statutory provisions that allow the justice court judge to issue warrants enforceable outside his county when the offense was committed within his

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The Supreme Court has noted that in some circumstances an informant's tip can be so detailed as to be "self-verifying," thereby establishing probable cause without regard to the character of the informant. Draper v. United States, 358 U.S. 307, 313 (1959); *accord*, Joyce v. State, 327 So. 2d 255, 259 (Miss. 1976).

[94] 184 So. 2d 635 (Miss. 1967).

[95] *Id.* at 638. The case was discussed in Bradley, Hodge & Rainey, *The 1965-66 Mississippi Supreme Court Term—Some Significant Cases*, 38 MISS. L.J. 1, 15 (1966) (noting that *O'Bean* overturned a line of cases holding a magistrate's finding of probable cause to be conclusive), and Williams, Williams & Thackston, *supra* note 92, at 361-63 (noting that the *Aguilar* and *O'Bean* decisions required a dramatic change from past practices of magistrates' "rubber stamping" requests for warrants).

[96] 184 So. 2d at 638.

[97] *E.g.*, Pruett v. State, 261 So. 2d 119, 121-22 (Miss. 1972) (*Aguilar* standards were followed in affidavit and testimony to establish probable cause for a search warrant); Ferguson v. State *ex. rel.* Biggers, 250 So. 2d 634, 636-37 (Miss. 1971) (insufficient statement of underlying facts invalidated two search warrants).

[98] *E.g.*, Butler v. State, 296 So. 2d 673, 675 (Miss. 1974) (the affidavit and sworn testimony created a strong suspicion that the defendant committed the murder, but did not rise to probable cause), *cert. denied*, 422 U.S. 1051 (1975); Ferguson v. State *ex rel.* Biggers, 250 So. 2d 634, 636 (Miss. 1971) (no affidavit—two arrest warrants declared invalid).

[99] MISS. CODE ANN. § 99-3-19 (1972) (a justice court judge's warrant issued for an offense committed in his county is good across county line); *id.* § 99-3-21 (a justice court judge may issue a warrant for an offender who comes into his county); *id.* § 99-15-1 (defining conservators of the peace); *id.* § 99-15-5 (authorizing conservators of the peace to issue warrants); *id.* § 99-27-9 (authorizing arrest warrants to be issued by justice court judges for certain alcohol violations).

[100] Miss. Unif. Crim. R. Cir. Ct. Prac. 1.01.

[101] MISS. CODE ANN. §§ 99-15-1, -5 (1972).

[102] *Id.*

jurisdiction.[103] Conversely, a justice court judge may issue a valid warrant for a suspect who has entered his jurisdiction.[104]

This seemingly simple scheme is not without complications. Section 99-15-1 defines all judges in constitutional courts as "conservators of the peace,"[105] and section 99-15-5 gives "[a]ny conservator of the peace" the power to issue arrest warrants.[106] But Mississippi Constitution Art. VI, § 167 defines "conservators of the peace" as "[a]ll civil officers"[107]—a somewhat broader description. In resolving this ambiguity, the supreme court adopted the more restrictive construction[108] and held arrest warrants not issued by judges in constitutional courts to be invalid.[109]

Unfortunately, this lucid ruling was subsequently obfuscated. In *Cooper v. State*[110] a county clerk issued a capias to arrest the defendant on a misdemeanor warrant.[111] The court approved the method, noting that the clerk had acted as clerk of his court, not as a conservator of the peace as in *Martin*.[112] The capias was distinguished from an ordinary arrest warrant as being ordinary process, which a county clerk is empowered to issue.[113] The *Cooper* decision is disturbing since, by its rationale, the warrant in *Martin* could have been held valid.[114] Nevertheless, since

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[103] *Id.* § 99-30-19.

[104] *Id.* § 99-3-21.

[105] *Id.* § 99-15-1.

[106] *Id.* § 99-15-5.

[107] MISS. CONST. art. VI, § 167.

[108] Martin v. State, 190 Miss. 32, 43, 199 So. 98, 102 (1940). The code sections used in the text have been updated to the 1972 code from the 1930 code, where they appeared as MISS. CODE ANN. §§ 1320, 1321 (1930). The only relevant difference in wording in the two codes is between § 1320 and § 99-15-1. The earlier code allowed issuance of warrants by "[t]he judges of the Supreme, circuit, and chancery courts *and* conservators of the peace." MISS. CODE ANN. § 1320 (1930) (emphasis added). The present code changes the emphasized "and" to "are." *Id.* § 99-15-1 (1972). In *Martin* the court held that "and" in § 1320 was a misprint and should read "are," thereby eliminating any possible conflict between the case and the present statute. Martin v. State, 190 Miss. 32, 40-41, 199 So. 98, 102 (1940).

[109] 190 Miss. at 40-41, 199 So. at 102. It would not be constitutionally permissible for some of the parties named in § 167 to issue warrants since they are law enforcement officials, not neutral and detached magistrates. In Coolidge v. New Hampshire, 403 U.S. 443 (1971), for example, a search warrant issued by the state attorney general was declared invalid for this very reason. *Id.* at 453.

[110] 193 Miss. 672, 10 So. 2d 764 (1942).

[111] *Id.* at 674, 10 So. 2d at 764.

[112] *Id.* at 675, 10 So. 2d at 765.

[113] *Id.* at 674, 10 So. 2d at 764. The court noted that an affidavit serves as an indictment in county court, see MISS. CODE ANN. § 9-9-27 (1972), and that the process for arrest on an indictment is a capias, *id.* § 99-9-1. The court held: "The term 'process' includes the ordinary warrant for arrest." 193 Miss. at 674, 10 So. 2d at 764. From there the court looked to what is now MISS. CODE ANN. § 13-3-3 (1972), which states that process need not be signed by the judge, but merely signed and sealed by the clerk.

[114] 193 Miss. at 674, 10 So. 2d at 765.

this issue has not been litigated further, *Cooper* appears to have created a viable exception to the general rule of *Martin.*

3. Paragraph 3—Form of a Warrant

Rule 1.01 substantially deviates from the Mississippi statutory requirements[115] regarding the form of a warrant in only two significant respects: first, the rule's formal requirements are much more general than the statute; and, second, where bail is a matter of right bail provisions must be stipulated in the warrant.[116] In most instances, the magistrate must specify the amount of the bond and its return date.[117] This progressive innovation will expedite release on bond and tend to prevent situations such as that in *Sheffield v. Reece*[118] where the defendant, having been arrested on Saturday, had no opportunity to post bond until Monday.[119] In addition, the state constitutional mandate that release on bail be readily available except in capital crimes where "the proof is evident or the presumption great" will be furthered.[120]

Rules similar to 1.01(7) have been adopted by other states.[121] At the suggestion of the state bar, the Criminal Law Committee of the Conference of Circuit Judges has amended the proposed rule to require that warrants stipulate appearance before a magistrate "forthwith."[122] While not materially altering the rule, this emendation has the salutary effect of emphasizing the importance of the defendant's right to a prompt appearance before a court.[123]

4. Paragraph 4—Correction of Formal Errors

Following the Florida rule,[124] the last paragraph of rule 1.01 provides that purely formal defects shall not result in the defendant's dis-

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[115] MISS. CODE ANN. § 99-25-5 (1972).

[116] Miss. Unif. Crim. R. Cir. Ct. Prac. 1.01(7).

[117] *Id.*

[118] 201 Miss. 133, 28 So. 2d 745 (1947) (en banc).

[119] *Id.* at 136-37, 28 So. 2d at 746. This was a civil action against the sheriff for false imprisonment. The court held that a sheriff, having the authority to set and accept bond on misdemeanors where a warrant exists, should have similar power where the arrest is without a warrant. *Id.* at 143, 28 So. 2d at 749. Rule 1.01(7) would simplify the procedures to be used by having the bond amount set in advance along with the return day, and would also extend the privilege to most felony cases. Miss. Unif. Crim. R. Cir. Ct. Prac. 1.01(7).

[120] MISS. CONST. art. III, § 29.

[121] *E.g.*, ARIZ. R. CRIM. P. 3.2(a); FLA. R. CRIM. P. 3.121(7); MINN. R. CRIM. P. 3.02 (optional in felony and gross misdemeanor cases).

[122] Letter from George Van Zant, Executive Director of the Mississippi State Bar, to the Conference of Circuit Court Judges, Mississippi Judicial College, and the Mississippi Supreme Court, at 3. On file with the *Mississippi Law Journal.*

[123] This is especially true when the effect of Miss. Unif. Crim. R. Cir. Ct. Prac. 1.04 is considered. That rule provides: "Every arrested person shall be taken before a judicial officer without unnecessary delay." *Id.*

[124] The paragraph changes one word of FLA. R. CRIM. P. 3.121(b).

charge.[125] The parallel Florida rule was construed in *Metzler v. State*,[126] where an arrest warrant was improperly termed an "alias summons." Nevertheless, the validity of the warrant was upheld since the defect was merely formal.[127] Similarly, in *Sears v. State*[128] the district court of appeals noted in dictum that an insufficient description of an offense is not fatal to the validity of an arrest warrant.[129] Although this rule cannot be employed to validate a warrant issued without probable cause, its proper construction should prevent the exclusion of evidence acquired incidentally to the arrest on the basis of mere technical flaws.

5. Conclusion

The drafters of rule 1.01 have attempted to formulate a practicable rule. Its mechanical requirements for such matters as providing information to the magistrate and creating guidelines for the drafting of the warrant are relatively simple. In such routine procedures simplicity is highly desirable. The rule's probable cause requirements are necessarily general given the complexity of this area of the law. To the extent that the concept of "probable cause" can ever be considered manageable the rule's utilitarian goal may be considered to have been achieved.

B. Rule 1.02—Arrest Without Warrant

As previously discussed in the context of rule 1.01,[130] an illegal arrest will not prevent the defendant's being tried.[131] Nevertheless, because evidence obtained in the course of an illegal arrest will be excluded at trial,[132] efficient law enforcement demands that arrests be validly made. The fact that in every arrest there is a possibility that evidence of crimes unrelated to the arrest may be discovered highlights the importance of a valid arrest.[133]

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[125] Miss. Unif. Crim. R. Cir. Ct. Prac. 1.01.

[126] 241 So. 2d 172 (Dist. Ct. App. Fla. 1970). A bail bondsman had requested the "summons" for the defendant in a pending case. When Metzler was arrested, stolen jewelry fell out of his shoe. An alias summons was improper since no original warrant had been returned unsatisfied. *Id.* at 172-73.

[127] *Id.* at 173 (citing FLA. R. CRIM. P. 3.121(c), later amended to *id.* 3.12(b)).

[128] 319 So. 2d 69 (Dist. Ct. App. Fla. 1975).

[129] *Id.* at 70 (dictum). The case was reversed on other grounds. *Id.*

[130] See note 72 and accompanying text *supra*.

[131] Frisbie v. Collins, 342 U.S. 519, 522 (1952). Of course, U.S. CONST. amend. IV and MISS. CONST. art. III, § 23 both provide for the protection of one's person against unreasonable seizure as well as protecting possessions. The court in *Frisbie* refused to adopt the remedy of releasing the defendant if his arrest were illegal. 342 U.S. at 522.

[132] *E.g.*, Smith v. State, 288 Miss. 476, 478, 87 So. 2d 917, 918 (1956) (where arresting officer did not witness commission of crime, warrantless arrest was illegal and evidence obtained therefrom inadmissible).

[133] *See, e.g.*, Strode v. State, 231 So. 2d 779, 780-82 (Miss. 1970) (defendant arrested in Louisiana for bank robbery; search incident to arrest produced evidence linking him to a burglary in Hattiesburg, Mississippi); Fuqua v. State, 246 Miss. 191, 196-97, 145 So. 2d

Rule 1.02 addresses the validity of arrests made without a warrant. Unlike rule 1.01, which has only a general statutory basis, rule 1.02, while applicable only to officers,[134] directly tracks the provisions of section 99-3-7 of the Mississippi Code.[135] Generally, both rule and statute embody common law doctrines with some minor extensions.[136] Like the statute, the rule has five subdivisions, each treating a contingency in which a legal arrest may be made without a warrant. Since the first three subsections deal with the most commonly arising circumstances, these subsections will be treated more extensively than the others.

1. Offenses Committed in the Officer's Presence

Subdivision (1) of rule 1.02 and the corresponding part of section 99-7-3 evolved from the common law rule allowing an officer to arrest a person who committed or attempted to commit a breach of the peace in the officer's presence.[137] At common law this was the only situation in which an officer could arrest a defendant without a warrant for a misdemeanor.[138] Both the statute and rule 1.02 extend this common law power of warrantless arrest to include any indictable offense committed, attempted, or threatened in the officer's presence.[139] Despite the statutory expansion of common law, this provision of section 99-7-3 has been employed primarily to validate arrests for misdemeanors.[140] The reluctance to rely on the statute is presumably attributable to the fact that its standards are more stringent than the probable cause requirements for a felony arrest.[141]

One of the few interpretive problems arising under the theory of rule 1.02(1) has been defining the meaning of the phrase "committed in the

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152, 153-54 (1962) (defendant was arrested on the coast on a warrant outstanding in Jackson and burglar's tools were discovered in his car), *cert. denied*, 372 U.S. 709 (1963).

[134] This was a conscious restriction placed on the rule. Miss. Unif. Crim. R. Cir. Ct. Prac. 1.02, Annotation. The rule is not intended to affect the authority of a private citizen to make an arrest. *Id.*

[135] MISS. CODE ANN. § 99-3-7 (1972).

[136] *See* Williams, Williams & Thackston, *supra* note 92, at 364 (statute follows the common law). The rule does not deviate substantially from the statute. The bar committee studying the rule adopted resolutions suggesting amendments to rule 1.02. In subdivisions (3) and (4), for example, the committee version basically substitutes the language of § 99-3-7 for the present language. Letter from George Van Zant, *supra* note 122, at 1.

[137] *See* Smith v. State, 228 Miss. 476, 479-80, 87 So. 2d 917, 919 (1956) (conviction for sale of liquor reversed—crime was not committed in arresting officer's presence). *See also* Williams, Williams & Thackston, *supra* note 92, at 363.

[138] Williams, Williams & Thackston, *supra* note 92, at 363.

[139] MISS. CODE ANN. § 99-7-3 (1972); Miss. Unif. Crim. R. Cir. Ct. Prac. 1.02.

[140] *E.g.*, Watts v. State, 305 So. 2d 348, 349 (Miss. 1974) (traffic violation); Smith v. State, 228 Miss. 476, 478, 87 So. 2d 917, 918 (1956) (liquor sale—arrest invalid on other grounds); Copeland v. State, 202 Miss. 58, 60, 30 So. 2d 509, 509-10 (1947) (possession of intoxicating liquor).

[141] See Miss. Unif. Crim. R. Cir. Ct. Prac. 1.02(3), (4).

presence of an officer."[142] In *Baldwin v. State,*[143] a generally approved definition[144] was given: "A misdemeanor is being committed in the presence of an officer when he then and there acquires knowledge thereof through his senses, 'or inferences properly to be drawn from the testimony of the senses.' "[145]

The authority of an officer to make an arrest in the circumstances under consideration is not unlimited. For example, failure to make an arrest at the time the crime is committed will extinguish the power to arrest without a warrant[146] since the rationale for permitting warrantless arrests is to prevent escape or further offenses. In *Smith v. State,*[147] the defendant had sold whiskey to a sheriff who had then left the scene but had later returned and made the arrest.[148] The supreme court held the arrest invalid.[149] Having left the scene, the officer had no reason for having failed to obtain a warrant; the statute could not, therefore, be used to sanction the arrest.[150]

The original version of 1.02(1) is more lucidly expressed than its statutory source. The proposed amendment of the rule would not substantively alter rule 1.02(1),[151] but would make the rule less clear than

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[142] *Id.* 1.02(3). Similar words appear in MISS. CODE ANN. § 99-3-7 (1972) ("for an indictable offense committed . . . in his presence").

[143] 175 Miss. 316, 167 So. 61 (1936). The defendant was arrested, after a short chase, for possession of intoxicating liquor. The court held that observation of the neck of the bottle, along with a tip that the defendant was about to make a sale, was sufficient to validate the arrest. *Id.* at 319-20, 167 So. at 62.

[144] *See, e.g.*, Watts v. State, 305 So. 2d 348, 351 (Miss. 1974) (traffic offense committed in officer's presence); Reed v. State, 199 So. 2d 803, 808 (Miss. 1967) (outline of concealed gun was visible in defendant's hip pocket), *appeal dismissed and cert. denied,* 390 U.S. 413 (1968); Smith v. State, 228 Miss. 476, 478, 87 So. 2d 917, 918 (1956) (sale of whiskey to a deputy sheriff); Copeland v. State, 202 Miss. 58, 61, 30 So. 2d 509, 510 (1947) (smell of whiskey and top of whiskey bottle noticed by officer before arrest—termed a "close case"); Fulton v. City of Philadelphia, 168 Miss. 30, 32, 148 So. 346, 347 (1933) (arrest and search were illegal where sheriff had no indication of offense before arrest); *cf.* Patton v. State, 160 Miss. 274, 278, 135 So. 352, 353 (1931) (officer must be "in possession of facts showing the commission of a misdemeanor").

[145] 175 Miss. at 319, 167 So. at 62 (citations omitted).

[146] Smith v. State, 228 Miss. 476, 480, 87 So. 2d 917, 919 (1956).

[147] 228 Miss. 476, 87 So. 2d 917 (1956).

[148] *Id.* at 478, 87 So. 2d at 918.

[149] *Id.*

[150] *Id.* The court did note that under certain circumstances delay might be justified—e.g., pursuing the offender or summoning aid. *Id.* This view was implicitly verified in Watts v. State, 305 So. 2d 348 (Miss. 1974), where the police pursued Watts into his house after seeing him commit a traffic violation. The arrest was delayed, but was held to be valid. *Id.* at 351. In a civil context, the court has held that a warrantless arrest cannot be made for a misdemeanor unless pursuit is begun immediately. Protective Life Ins. Co. v. Spears, 231 So. 2d 510, 512 (Miss. 1970).

[151] The subsection as amended would read: "An officer may arrest any person without a warrant under the following circumstances: (1) For any offense committed in the presence of an officer but the officer must obtain a warrant regarding a misdemeanor which occurred out of his presence . . . ." Letter from George Van Zant, *supra* note 122, at 3.

it was in its original form. It is true that the proposed subsection, as amended, explicitly prohibits warrantless arrests when the offense is not committed in the officer's presence;[152] but this restriction is merely a reiteration of the common law doctrine which, it must be presumed, would be in effect in the absence of the new rule.[153] Since this doctrine is already well-established in the law, its express inclusion in the amended version is not a sufficient reason for sacrificing the clarity of the rule as originally proposed.

2. Officer's Knowledge of an Existing Misdemeanor Warrant

The second subdivision of rule 1.02 deals only with misdemeanor arrests.[154] This subdivision, which originates in a 1968 statutory amendment[155] now codified as section 99-3-7 of the Mississippi Code, permits an officer to make a warrantless arrest if the officer is officially aware of an outstanding warrant for the suspect.[156] Prior to this amendment, the supreme court had held that such warrantless arrests were permissible only if the offense were committed in the officer's presence.[157]

Proposed rule 1.02(2) expands slightly this statutory power of warrantless arrest. Whereas the statute stipulates that the knowledge must be acquired "through official channels,"[158] the proposed rule requires only that the officer have "personal knowledge" of the outstanding warrant.[159] This difference, although small, is significant since under 1.02(2) the prosecution need not prove how the officer became aware of the existing warrant. In its effect, however, the proposed rule merely follows the supreme court's construction of section 99-3-7 in *Torrence v. State,*[160] where the court validated the arrest simply on the ground that "the officer knew of [the warrant's] existence."[161] This ruling and its adop-

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[152] *Id.*

[153] See note 138 *supra.*

[154] Miss. Unif. Crim. R. Cir. Ct. Prac. 1.02(2) provides: "An officer may arrest any person without a warrant under the following circumstances: . . . (2) Where there is a warrant in existence for a misdemeanant, and the officer has personal knowledge of the warrant."

[155] 1968 Miss. Laws, ch. 355, § 1. MISS. CODE ANN. § 2470 (1956) did not contain any similar provision.

[156] MISS. CODE ANN. § 99-3-7 (1972).

[157] *E.g.,* Butler v. State, 212 So. 2d 573, 576 (Miss. 1968) (outstanding assault and battery warrant not shown at trial to be for a felony, so arrest must be considered illegal); Smith v. State, 208 So. 2d 746, 747 (Miss. 1968) (defendant could resist arrest on reckless driving charge when the deputy tried to arrest without a warrant in his possession). The amended statute was applied in Torrence v. State, 283 So. 2d 595 (Miss. 1973), where the court held a warrantless arrest valid because the officer knew of an outstanding warrant. *Id.* at 596-97.

[158] MISS. CODE ANN. § 99-3-7 (1972).

[159] Miss. Unif. Crim. R. Cir. Ct. Prac. 1.02(2).

[160] 283 So. 2d 595 (Miss. 1973).

[161] *Id.* at 597.

tion in 1.02(2) further the essential interest of the legislature in passing the 1968 version of the statute in at least two respects. First, there are very few occasions in which the officer's knowledge of the extant warrant does not come from official channels. Second, technical quibbling concerning how the officer learned of the warrant would frustrate substantive justice.

3. Felony Arrests Without a Warrant

While rule 1.02 rigidly defines the requirements for warrantless misdemeanor arrests, felony arrests are governed by the nebulous demands of probable cause.[162] The relevant subsections of the proposed rule are based on the statutorily expressed common law doctrine for felony arrests without a warrant as construed by the supreme court: "[T]here must be probable cause to believe that (1) a felony has been committed, and (2) that the person to be arrested is the guilty party."[163] Although these criteria are identical to those for procuring an arrest warrant[164] the initial determination of probable cause is here made by the arresting officer and only later reviewed by a magistrate.[165]

The proposed rule is, however, somewhat more restrictive than its common law antecedent. Subsection (3) of rule 1.02 permits a warrantless felony arrest only when a felony has in fact been committed and the arresting officer has probable cause to believe that the suspect committed the crime.[166] Under the traditional rule, the officer must only have had probable cause to believe that a felony had been committed; of course, he must also have had probable cause for believing the suspect to be guilty. Yet the proposed rule should present no problems of undue difficulty since the officer is usually aware of the crime's commission before he goes in search of the culprit.[167]

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[162] Rules 1.02(3) and (4) use the term "reasonable grounds," but the annotation to the rule points out that this standard is analogous to "probable cause." Miss. Unif. Crim. R. Cir. Ct. Prac. 1.02(3), Annotation.

[163] Craft v. State, 202 Miss. 43, 49, 30 So. 2d 414, 415-16 (1947); *accord,* Pickett v. State, 139 Miss. 529, 549, 104 So. 358, 359 (1925) (en banc). *But see* Baylor v. State, 246 So. 2d 516, 516-18 (Miss. 1971) (the code "provides for an arrest without a warrant where the officers have a reasonable or probable cause to believe that (1) a felony has been committed, and (2) the person who is arrested has committed it").

[164] See note 81 and accompanying text *supra.*

[165] *E.g.,* Anthony v. State, 220 So. 2d 837, 840 (Miss. 1969) (motion to suppress evidence seized during arrest).

[166] Miss. Unif. Crim. R. Cir. Ct. Prac. 1.02(3). Miss. Code Ann. § 99-3-7 (1972) is to the same effect with slightly different wording, and addresses both law enforcement officers and private citizens. The fourth and fourteenth amendments require such a probable cause standard. Henry v. United States, 361 U.S. 98, 100 (1959); *see* Wong Sun v. United States, 371 U.S. 471, 479-80 (1963) (probable cause to believe that the person to be arrested committed a felony is the constitutional minimum for warrantless arrest).

[167] *See, e.g.,* Evans v. State, 275 So. 2d 83, 84-85 (Miss. 1973) (murder case where officers discovered several witnesses who saw Evans near the scene of the crime on the

4. Felony Committed Outside an Officer's Presence

Rule 1.02(5) allows warrantless arrest when a suspect has committed a felony outside the presence of an officer.[168] This rule, if construed literally, violates the fourth amendment prohibition against unreasonable search and seizure[169] since it appears to permit arrest in the total absence of probable cause. Any such practice would be plainly contrary to the holdings of both the United States Supreme Court[170] and the Mississippi Supreme Court.[171] Indeed, that portion of section 99-3-7 of the Mississippi Code to which rule 1.02(5) is similar has simply been ignored by the Mississippi court. It is unfortunate that the proposed rules should, without comment, perpetuate this seemingly unconstitutional position.

5. Informing the Defendant of His Arrest

With limited exceptions, the second paragraph of rule 1.02 requires the arresting officer to inform the suspect of the reason for his arrest.[172] Obviously, simple fairness dictates that this practice be followed routinely. Yet, since the failure to inform the suspect immediately of the grounds for his arrest is unrelated to the existence of probable cause, it also seems unfair to invalidate an arrest for failure to meet this entirely salutary requirement.[173] Invalidation of an arrest in such a circumstance

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day of the murder justified arrest); Powe v. State, 235 So. 2d 920, 920-21 (Miss. 1970) (police investigated burglary scene before pursuing defendant); Strode v. State, 231 So. 2d 779, 791 (Miss. 1970) (bank robbery investigators arrested Strode on a tip); McCollum v. State, 197 So. 2d 252, 253-54 (Miss. 1967) (attempted burglary noted—officers then sought out defendant); *cf.* Branning v. State, 215 Miss. 223, 224-26, 60 So. 2d 633, 633-34 (1952) (in drugstore burglary, the fact that defendant was a customer did not constitute probable cause to arrest); Craft v. State, 202 Miss. 43, 47-49, 30 So. 2d 414, 414-15 (1947) (sheriff acted without probable cause in attempting to arrest defendant merely because he was present where felony committed).

[168] Miss. Unif. Crim. R. Cir. Ct. Prac. 1.02(5). MISS. CODE ANN. § 99-3-7 (1972) contains a similar provision.

[169] U.S. CONST. amend. IV. The rule also violates the parallel Mississippi provision, MISS. CONST. art. III, § 23.

[170] *See* United States v. Watson, 423 U.S. 411, 417 (1976) (upholding warrantless felony arrest by postal officers pursuant to statutory authorization); Henry v. United States, 361 U.S. 98, 100 (1959) (conviction reversed where there was no probable cause for warrantless arrest). In Wong Sun v. United States, 371 U.S. 471 (1963), Justice Brennan, writing for the Court, suggested an even higher standard might be applicable: "Whether or not the requirements of reliability and particularity of the information on which an officer may act are more stringent where an arrest warrant is absent, they surely cannot be less stringent than where an arrest warrant is obtained." *Id.* at 479.

[171] *See* Powe v. State, 235 So. 2d 920, 922 (Miss. 1970) (warrantless arrest upheld where officers observed defendant fleeing from scene of crime); Craft v. State, 202 Miss. 43, 49, 30 So. 2d 414, 415-16 (1947) (warrantless felony arrest invalid where sheriff merely had good grounds to believe person arrested was present when felony was committed).

[172] Miss. Unif. Crim. R. Cir. Ct. Prac. 1.02.

[173] *Id.* 1.02, Annotations.

would deprive the state of evidence seized in a search incident to the arrest where probable cause existed to believe the defendant committed the crime—a harsh penalty for a relatively minor omission.

This issue has not always been clearly treated by the Mississippi Supreme Court. In *Fuqua v. State*[174] the court held that failure to inform the defendant of the reason for his arrest does not invalidate the arrest.[175] Yet, in the earlier case of *Clay v. State,*[176] the court had found that the defendant's allegation that he had not been informed by the officer of the cause of his warrantless arrest constituted "a *prima facie* case of illegal detention and arrest."[177] The burden was then shifted to the state to show probable cause for the arrest.[178] This conjunction of failure to inform with the existence of probable cause was illogical and unnecessary. In *Clay,*[179] the court relied on *Beck v. Ohio,*[180] in which the Supreme Court held that whenever the constitutionality of an arrest is challenged for any reason, the state must establish probable cause.[181] It follows that if the burden of showing probable cause is to be imposed on the state, the defendant must directly challenge the arrest itself rather than merely asserting the officer's failure to inform.[182]

Although a valid arrest can be made despite a failure to inform the suspect of the reason for his arrest, failure to inform the suspect that he is being taken into custody may render an arrest invalid. In *Hinton v. Sims,*[183] a deputy sheriff merely told the suspect to put up his hands, and then fatally shot him when the suspect instead reached into his pocket.[184] The arrest was held to have been illegally made, with the court characterizing the officer's language as that "of the highwayman."[185] The court further stated, however: "We do not mean to convey the idea that the officer must always inform the person sought to be arrested, but

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[174] 246 Miss. 191, 145 So. 2d 152 (1962), *cert denied,* 372 U.S. 709 (1963).

[175] 246 Miss. at 202, 145 So. 2d at 156; *accord,* Upshaw v. State, 350 So. 2d 1358, 1363 (Miss. 1977); Baylor v. State, 246 So. 2d 516, 518 (Miss. 1971); Bennett v. State, 211 So. 2d 520, 526 (Miss. 1968), *appeal dismissed and cert. denied,* 393 U.S. 320 (1969).

[176] 184 So. 2d 403 (Miss. 1966).

[177] *Id.* at 406.

[178] *Id.* The case was reversed since the state had not shown probable cause to arrest Clay. *Id.*

[179] *Id.*

[180] 379 U.S. 89 (1964).

[181] *Id.* at 97.

[182] *Id.* The rule in the *Clay* case has been cited in several other cases, although none of the cases have been reversed on the principle. *E.g.,* Barnett v. United States, 384 F.2d 848, 855 n.9 (5th Cir. 1967); Upshaw v. State, 350 So. 2d 1358, 1363 (Miss. 1977); Baylor v. State, 246 So. 2d 516, 518 (Miss. 1971). *But see* Bennett v. State, 211 So. 2d 520, 526 (Miss. 1968) (citing *Fuqua* without any further qualifications), *appeal dismissed and cert. denied,* 393 U.S. 320 (1969).

[183] 191 Miss. 741, 158 So. 141 (1934).

[184] *Id.* at 744-45, 158 So. at 141.

[185] *Id.* at 747, 158 So. at 142.

we do hold that, except in rare cases . . . he should inform him that he consider himself under arrest."[186]

There are exceptions to the rule 1.02 requirement of informing the defendant: (1) if the crime is committed in the officer's presence, and (2) if the suspect is apprehended during pursuit.[187] In the first instance it is obviously unnecessary to inform the defendant of his illegal conduct; in the second, since the arrest begins with the commencing of pursuit,[188] it is impractical.

C. *Reciprocal Criminal Discovery*

Unlike rules 1.01 and 1.02, rule 4.06,[189] containing the provisions for criminal discovery, represents a significant departure from prior procedures in Mississippi.[190] Like most innovations, rule 4.06 has engendered controversy. Both the Mississippi State Bar[191] and the Mississippi Prosecutors Association[192] have suggested extensive changes to the rule. As a result of this debate, the proposed rule has been revised and improved.[193]

The very concept of criminal discovery has historically been controversial. Judge Learned Hand, for example, believed that under our system of criminal justice the defendant has so many advantages that the introduction of criminal discovery would unfairly disrupt the balance between the interests of the state and those of the accused.[194] Former Chief Justice Vanderbilt of the New Jersey Supreme Court thought that

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[186] *Id.* at 748, 158 So. at 142.

[187] Miss. Unif. Crim. R. Cir. Ct. Prac. 1.02. The second exception was approved in Watts v. State, 305 So. 2d 348, 351 (Miss. 1974) (assault conviction affirmed where defendant shot at officer during flight in warrantless arrest for traffic violation).

[188] Terry v. State, 252 Miss. 479, 485, 173 So. 2d 889, 891 (1965); Smith v. State, 240 Miss. 738, 743, 128 So. 2d 857, 859 (1961).

[189] Miss. Unif. Crim. R. Cir. Ct. Prac. 4.06.

[190] *See* Comment, *Criminal Procedure in Mississippi: A Summary of the Right to Assistance of Counsel, the Right of Confrontation, and Juvenile Quasi-Criminal Proceedings,* 47 MISS. L.J. 91, 101 (1976) (noting recent small advances in criminal discovery).

[191] Letter from George Van Zant, *supra* note 122, at 11-12.

[192] Mississippi Prosecutors Association, *Objections and Recommendations Regarding the Proposed Uniform Criminal Rules* 6 (1977).

[193] In response to suggestions by the Mississippi Bar Association, a new subsection seven, involving reports or statements of experts, has been added to the first paragraph of the rule. Letter from George Van Zant, *supra* note 122, at 11. Another amendment rewrote the paragraph concerning the disclosure of the identity of an informant. *Id.* at 12.

[194] United States v. Garson, 291 F. 646, 649 (S.D.N.Y. 1923). Judge Hand said,

> Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see.

Id.

criminal discovery would lead to perjury, the threatening or bribing of witnesses, and to a general reluctance of witnesses to come forward with evidence.[195] On the other hand, the distinguished jurist Chief Justice Traynor of California has endorsed criminal discovery,[196] and Justice Brennan, while recognizing the validity of certain criticisms, has nevertheless expressed his belief that any such objections are either outweighed by the benefits of criminal discovery or can be ameliorated by judicial control of the process.[197] Many other commentators have recently advocated the practice,[198] and more and more states are adopting it.[199]

Given the importance of proposed rule 4.06 and the sweeping changes its adoption will create in Mississippi's criminal procedure law, some consideration of contextual material is in order. Therefore, in the following section, prior to an examination of the proposed rule itself, the current status of criminal discovery in Mississippi will be considered, as will the constitutional ramifications of the proposed rule.

1. Mississippi Criminal Discovery Before Rule 4.06

There is at present no statutory basis for criminal discovery in Mississippi. To the extent that the practice exists at all, it is a creature of Mississippi case law and the requirements of United States Supreme Court decisions. The Supreme Court has mandated that, upon request, the prosecution must disclose certain information to the defense,[200] including, under some circumstances, the revelation of confidential informants' identities.[201] Under Mississippi case law, the court may in its discretion order the prosecution to disclose materials[202] although the defendant's right to demand access to such materials is severely limited. In addition, the defendant is entitled to inspect tangible evidence in the prosecutor's possession.[203] In some situations he may also obtain prior

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[195] State v. Tune, 13 N.J. 203, 98 A.2d 881, 884 (1953).

[196] *See* Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. REV. 228 (arguing for expanded criminal discovery in federal and state courts).

[197] Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U.L.Q. 279, 291-94.

[198] *E.g.*, Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293, 322 (1960); Rice, *Criminal Defense Discovery: A Prelude to Justice or an Interlude for Abuse?*, 45 MISS. L.J. 887, 910 (1974).

[199] Fletcher, *supra* note 198, at 297.

[200] See notes 206 through 213 and accompanying text *infra*.

[201] See notes 215 & 216 and accompanying text *infra*.

[202] *See, e.g.*, Knowles v. State, 341 So. 2d 913, 917 (Miss. 1977) (pertaining to production of witness statements); Armstrong v. State, 214 So. 2d 589, 596 (Miss. 1968) (any materials in possession or under control of prosecution), *cert. denied*, 395 U.S. 965 (1969); Mattox v. State, 243 Miss. 402, 418, 139 So. 2d 653, 654 (1962) (witness statements).

[203] Armstrong v. State, 214 So. 2d 589, 596 (Miss. 1968), *cert. denied*, 395 U.S. 965 (1969).

statements of prosecution witnesses.[204] These matters are treated in the discussion on various sections of the proposed rule.[205]

a. *Brady Requests*

The landmark case of *Brady v. Maryland*[206] established the criminal defendant's right to acquire by discovery any evidence in the state's possession materially favorable to the accused on the issues of guilt or punishment.[207] Yet the circumstances in which the state's failure to comply justifies reversal have not always been clearly articulated by the courts.[208] In *United States v. Agurs*,[209] however, a practicable rule was finally established—regardless of the prosecutor's motives, "if the omitted evidence creates a reasonable doubt that did not otherwise exist," a new trial must be ordered.[210]

To this general rule the Fifth Circuit has created an exception. In *Garrison v. Maggio*[211] that court held that the omission of evidence held for the sole purpose of impeaching a state's witness will not require a new trial unless the evidence is so significant that its use would probably have mandated an acquittal.[212] However dubious,[213] this qualification of *Brady* probably does nothing to blunt the efficacy of the *Brady* procedure since the materiality requirements of *Brady* and *Agurs* may be considered to subsume the *Garrison* exception. Finally, it should be noted that in Mississippi *Brady* requests have been recognized as constitutionally mandated under the due process clause of the fourteenth amendment.[214]

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[204] Mattox v. State, 243 Miss. 402, 418-19, 139 So. 2d 653, 654 (1962) (on suggestion of error) (to justify request of accused for statement of state's witness, it must be shown that the statement is at variance with the witness' testimony).

[205] Miss. Unif. Crim. R. Cir. Ct. Prac. 4.06. *Brady* requests are dealt with in paragraph 1(6); informants in paragraph 4(2); tangible evidence in paragraph 1(5); and witnesses' statements in paragraph 12.

[206] 373 U.S. 83 (1963).

[207] *Id.* at 87.

[208] *See, e.g.*, Moore v. Illinois, 408 U.S. 786 (1972), where the Court, on a more or less ad hoc basis, decided that an omitted witness statement was not material and that reversal was not in order. *Id.* at 796-97. *See generally* Rice, *supra* note 198, at 890-96.

[209] 427 U.S. 97 (1976).

[210] *Id.* at 112.

[211] 540 F.2d 1271 (5th Cir. 1976), *cert. denied*, 431 U.S. 940 (1977), *noted in* 48 MISS. L.J. 647 (1977).

[212] 540 F.2d at 1274.

[213] *See* 48 MISS. L.J. 647, 655 (1977).

[214] *E.g.*, McNamee v. State, 313 So. 2d 392, 394-95 (Miss. 1975) (results of blood analysis of deceased in auto accident manslaughter case should have been given to defendant); McNeil v. State, 308 So. 2d 236, 241 (Miss. 1975) (discovery of wallet not belonging to deceased or defendant in murder victim's automobile should have been disclosed).

b. *Informants*

When the evidence offered by a confidential informant materially contributes to an arrest the defendant is, under some circumstances, entitled to be apprised of the informant's identity. In *Roviaro v. United States*[215] it was held that "fundamental requirements of fairness" demand disclosure of the informant's identity when it is "relevant and helpful to the defense."[216]

The *Roviaro* doctrine has been followed in Mississippi.[217] The supreme court has, for example, held that when the confidential informant is an eyewitness to the alleged crime his identity must be released.[218] Nevertheless, when the informant is not a participant in the crime, his identity may remain confidential[219] unless there is some substantial reason for its disclosure.[220]

It is obvious that the *Roviaro* doctrine has its origins in the confrontation clause of the sixth amendment to the United States Constitution. It should be noted, however, that the Mississippi Constitution imposes a similar requirement.[221]

c. *Tangible Items*

Although a defendant in Mississippi is presently not entitled to criminal discovery as a matter of right,[222] the supreme court held in *Armstrong v. State*[223] that a defendant does have the right to inspect material, tangible evidence in the prosecutor's possession.[224] Such a request is, however, directed to the trial court's sound discretion,[225] and

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[215] 353 U.S. 53 (1957).

[216] *Id.* at 60-61.

[217] *E.g.*, Raper v. State, 317 So. 2d 709 (Miss. 1975). The informant knew the defendant had not had possession of the marijuana for a period before the arrest, a point very helpful to Raper since he was only in constructive possession of the drugs when arrested. *Id.* at 714.

[218] Sims v. State, 313 So. 2d 27, 29 (Miss. 1975); *accord*, Hardy v. State, 313 So. 2d 26, 27 (Miss. 1975) (necessary where essential for a fair trial).

[219] Mills v. State, 304 So. 2d 651, 652 (Miss. 1974); Young v. State, 245 So. 2d 26, 27 (Miss. 1971); *see* McCray v. Illinois, 386 U.S. 300, 313-14 (1967) (informant merely provided probable cause for arrest; confidentiality upheld).

[220] *E.g.*, Raper v. State, 317 So. 2d 709, 714 (Miss. 1975) (informant did not participate in drug sale, but knew important facts favorable to defendant; disclosure ordered).

[221] MISS. CONST. art. III, § 26; *see* Raper v. State, 317 So. 2d 709, 714 (Miss. 1975) (where informant is participant, or is material to accused's defense, state must divulge his identity); Sims v. State, 313 So. 2d 27, 30 (Miss. 1975) (Rodgers, P.J., concurring) (same).

[222] *See* Armstrong v. State, 214 So. 2d 589, 596 (Miss. 1968) (criminal defendant's discovery rights are limited), *cert. denied*, 395 U.S. 965 (1969).

[223] 214 So. 2d 589 (Miss. 1968), *cert. denied*, 395 U.S. 965 (1969).

[224] 214 So. 2d at 596.

[225] McGraw v. State, 260 So. 2d 457, 461 (Miss. 1972); Peterson v. State, 242 So. 2d 420, 424 (Miss. 1970).

its denial will not provide ground for reversal unless the defendant can show that he was prejudiced by the denial.[226] Yet, in most cases, the request will procure an order for disclosure.[227]

As with *Brady*, the rule laid down in *Armstrong* has been criticized for the vagueness of its materiality requirement. At least one writer[228] has argued that the combination of this requirement with *Armstrong*'s additional demand that prejudice be shown has, in Mississippi, effectively denied the constitutional right of discovery.[229] By eliminating the materiality requirement of *Armstrong*, rule 4.06 should to some extent obviate this criticism.

d. Statements of Witnesses

In certain circumstances Mississippi case law allows a defendant to obtain the statement of a prosecution witness for purposes of impeachment. The conditions upon which this information may be acquired are most clearly defined in *Mattox v. State*.[230] There the court held that

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[226] *See* Gentry v. State, 338 So. 2d 1229, 1232 (Miss. 1976) (denial of motion for slide containing sperm in rape case held not reversible error); Hannah v. State, 336 So. 2d 1317, 1322 (Miss. 1976) (no prejudice when defendant did not get to examine certain checks not received by prosecution until just before trial), *cert. denied*, 429 U.S. 1101 (1977); Jackson v. State, 243 So. 2d 396, 398 (Miss. 1971) (defendant entitled to test a sample of marijuana since the identity of the substance was critical to his case); Armstrong v. State, 214 So. 2d 580, 596-97 (Miss. 1968) (although motion was denied, it was evident defendant would not have benefited from disclosure), *cert. denied*, 395 U.S. 965 (1969); *cf.* Peterson v. State, 242 So. 2d 420, 424 (Miss. 1970) (no prejudice where defendant never requested to see evidence offered by prosecution).

[227] *See* Gentry v. State, 338 So. 2d 1229, 1232 (Miss. 1976) ("the better practice would have been to provide the defendant with any physical evidence used in scientific tests as the basis of testimony against him"); Jones v. State, 330 So. 2d 597, 601 (Miss. 1976) (tangible evidence not disclosed by prosecution after court order should not have been admitted); Armstrong v. State, 214 So. 2d 589, 596 (Miss. 1968) ("material, tangible evidence must not be concealed from the defendant"), *cert. denied*, 395 U.S. 965 (1969).

[228] Rice, *supra* note 198, at 894-95.

[229] *Id.* To some extent this criticism is valid. See the cases in note 226 *supra*, where most non-disclosures have been declared to be not prejudicial.

[230] 243 Miss. 402, 139 So. 2d 653 (1962) (on suggestion of error). *Mattox* is not without predecessors. In Bellew v. State, 238 Miss. 734, 752-56, 106 So. 2d 146, 153-56 (1958), *appeal dismissed and cert. denied*, 360 U.S. 473 (1959), the court held that the defendants were not entitled to prior statements of prosecution witnesses. In Eaton v. State, 163 Miss. 130, 143-45, 140 So. 729, 732 (1932), the court considered the validity of a subpoena duces tecum served upon the prosecutor for statements made by the various prosecution witnesses. The court noted the provisions of MISS. CODE ANN. § 744 (1930) (now *id.* § 11-1-51(1) (Supp. 1977) (as amended)), which allowed disclosure of material held by the other party "for good cause shown." The court held that good cause for production was not shown and affirmed the denial of the subpoena. 163 Miss. at 145, 140 So. at 732. Contrasted with these two cases, and easily distinguishable from them, is Sprinkle v. State, 137 Miss. 731, 740-41, 102 So. 844, 844-45 (1925) (en banc), where the court ordered production of a transcript of a dying declaration testified to at trial by the district attorney.

disclosure of a witness' statement is mandated in only two situations: (1) where there are material contradictions in the witness' testimony, and (2) where the statement may be submitted to the judge for his in camera examination for contradictory matter.[231] Such an order lies within the broad discretion of the court.[232] Since *Mattox*, this procedure has been followed in both *Armstrong v. State*[233] and *Knowles v. State*,[234] and has proved to be a workable, if somewhat restrictive rule.

Many other jurisdictions are less rigid and provide either by case law[235] or criminal rules[236] that statements of witnesses may be reached through discovery regardless of whether inconsistencies exist. A federal statute, the Jencks Act,[237] confers upon a defense attorney the right to receive upon request all statements of prosecution witnesses. Such requests, however, must be honored by the state only after the witness has been subjected to direct examination.[238] The statute was passed in direct response to *Jencks v. United States*,[239] in which the Supreme Court held that the government must, upon motion, release the prior statements of its witnesses.[240] Under both *Jencks* and the act it spawned, the defense is not required to show inconsistencies.[241] Since *Jencks* did not, however, involve a constitutional construction, but rather an exercise of the Court's rulemaking power,[242] the decision did not overturn the more restrictive position of Mississippi.

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[231] Mattox v. State, 243 Miss. 402, 418-19, 139 So. 2d 653, 654 (1962) (on suggestion of error).

[232] *Id.* at 418, 139 So. 2d at 654.

[233] 214 So. 2d 589, 594 (Miss. 1968), *cert. denied*, 395 U.S. 965 (1969). In *Armstrong*, the trial court examined witnesses' statements, found no contradiction, and thus ruled that the defendant was not entitled to them. 214 So. 2d at 594.

[234] 341 So. 2d 913, 916-17 (Miss. 1977). In *Knowles*, the defendant did not show any inconsistencies in the testimony, and the judge was not requested to examine the statements, so the motion was denied. *Id.*

[235] *See, e.g.*, People v. Durso, 239 Ill. 2d 842, 239 N.E.2d 842, 846 (1968) (a specific verbatim or substantially verbatim statement established to exist must be produced), *cert. denied*, 393 U.S. 1111 (1969); People v. Malinsky, 15 N.Y.2d 86, 209 N.E.2d 694, 697, 262 N.Y.S.2d 65 (1965) (relevant statements must be turned over, whether or not consistent with testimony); Hoffman v. State, 514 S.W.2d 248, 253 (Tex. Crim. App. 1974) (defendant, on motion, can inspect and use witness' prior statements or reports); Moore v. State, 384 S.W.2d 141, 142 (Tex. Crim. App. 1964) (defendant receives statements upon motion after direct examination).

[236] *See, e.g.*, ARIZ. R. CRIM. P. 15.1(a)(1); FLA. R. CRIM. P. 3.220(a)(1)(ii); MINN. R. CRIM. P. 1.01, subd. 1(1)(a); Mo. R. CRIM. P. 25.32(A)(1).

[237] 18 U.S.C. § 3500 (1976). The Act provides definitions of what type of statement can be produced, *id.* § 3500(e), and establishes a procedure for excising irrelevant material, *id.* § 3500(c). If the United States elects not to produce the statements, the witness' testimony is stricken and a mistrial may, in the judge's discretion, be declared. *Id.* § 3500(d).

[238] *Id.* § 3500.

[239] 353 U.S. 657 (1957).

[240] *Id.* at 668-69.

[241] *Id.*; 18 U.S.C. § 3500(b) (1976).

[242] United States v. Augenblick, 393 U.S. 348, 356 (1968); Palermo v. United States, 360 U.S. 343, 345 (1959).

2. The Constitutionality of Reciprocal Discovery

The fifth amendment to the United States Constitution states in part: "No person . . . shall be compelled in a Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."[243] Similarly, section 26 of the Mississippi Constitution provides: "In all criminal prosecutions the accused shall . . . not be compelled to give evidence against himself . . . ."[244] It is in the light of both these provisions that the validity of the rule 4.06 reciprocal discovery procedures must be considered.

Reciprocal discovery means that when the defendant seeks material from the state by discovery, he thereby exposes himself to discovery by the state. In short, the state's discovery rights are conditioned on a prior exercise of discovery by the defendant. It is clear, however, that such a procedure might easily conflict with the fifth amendment privilege against self-incrimination. Yet, when this issue was considered by the Advisory Committee in the drafting of the 1974 amendments to Federal Rule of Criminal Procedure 16(b)[245] the practice was not condemned.[246]

Although the constitutional issues were not considered, several federal district courts have granted motions for reciprocal discovery pursuant to rule 16(b).[247] The Supreme Court has yet to rule on this matter, but recent cases on closely analogous points indicate that reciprocal discovery procedures should be approved. For example, in *Williams v. Florida*[248] the Court upheld Florida's notice of alibi defense rule.[249] Under that rule, the prosecutor may demand from the defendant information concerning alibi defenses, including specification of the place and time of the alleged offense.[250] The defendant must respond with information concerning any alibi defense he desires to offer, including where the defendant claims to have been at the time of the offense and the names

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[243] U.S. CONST. amend. V. Actually, the application of the fifth amendment to the states is made through the due process clause of the fourteenth amendment. Malloy v. Hogan, 378 U.S. 1, 8 (1964).

[244] MISS. CONST. art. III, § 26.

[245] FED. R. CRIM. P. 16(b) (providing for reciprocal discovery by government).

[246] FED. R. CRIM. P., Advisory Comm. Note.

[247] *E.g.*, United States v. Sherman, 426 F. Supp. 85, 93 (S.D.N.Y. 1976); United States v. Whiteside, 391 F. Supp. 1385, 1389 (D. Del. 1975); United States v. Aadal, 280 F. Supp. 862, 862 (S.D.N.Y. 1967), *aff'd per curiam*, 407 F.2d 381 (2d Cir.), *cert. denied*, 395 U.S. 967 (1969).

In United States v. Estremera, 531 F.2d 1103, 1113 (2d Cir.), *cert. denied*, 425 U.S. 979 (1976), the Second Circuit affirmed a reciprocal discovery order after the defendant had requested prosecutorial discovery. Under the order of the district court the defendant was required to disclose material even though the prosecution had complied voluntarily with defense requests and even though the request was not simultaneous with defense requests. 531 F.2d at 1113.

[248] 399 U.S. 78 (1970).

[249] *Id.* at 83.

[250] FLA. R. CRIM. P. 3.200.

and addresses of any witnesses the defense intends to call to prove the alibi.[251] The prosecution, in turn, must disclose the identity of any witness it intends to call to rebut the defense.[252] In the face of both fifth and fourteenth amendment attacks, the Supreme Court specifically approved the reciprocity requirement of the Florida rule.[253] Writing for the Court, Justice White observed that "[a]t most, the rule only compelled petitioner to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information that the petitioner from the beginning planned to divulge at trial."[254] The importance of Florida's reciprocity rule was highlighted when in the subsequent case of *Wardius v. Oregon,*[255] the Court ruled that a statute without a reciprocal discovery provision violates the due process clause of the fourteenth amendment.[256] Indeed, in *Wardius,* the Court gave a general benediction to reciprocal discovery procedures:

> The growth of such discovery devices is a salutary development which, by increasing the evidence available to both parties, enhances the fairness of the adversary system. As we recognized in *Williams* nothing in the Due Process Clause precludes States from experimenting with systems of broad discovery designed to achieve these goals.[257]

This dicta indicates significant support for methods such as those inculcated by proposed rule 4.06.

In a related case, *United States v. Nobles,*[258] the Supreme Court held that where a defense investigator had testified regarding statements by witnesses, the compilation of statements on which the testimony was based is not protected by the fifth amendment from disclosure to the prosecution for purposes of impeachment.[259] Since the discovery was ordered during the trial, Federal Rule of Criminal Procedure 16 was held inapplicable.[260] Nevertheless, *Nobles* provides support for the theory that the defendant can be required to submit to certain limited reciprocal discovery procedures.[261]

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[251] *Id.*

[252] *Id.*

[253] 399 U.S. at 82-83.

[254] *Id.* at 85.

[255] 412 U.S. 470 (1973).

[256] *Id.* at 472.

[257] *Id.* at 474 (dictum).

[258] 422 U.S. 225 (1975).

[259] *Id.* at 234. The Court also held that the district court's exclusion of the investigator's testimony upon defense counsel's refusal to turn over the statements was a proper remedy. This overruled defendant's sixth amendment argument that he was denied the right of compulsory process. The Court noted that he was not denied compulsory process, but rather prevented only a partial view of the original witness' credibility by conditioning the testimony upon production of the statements. *Id.* at 241.

[260] The Court held that rule 16 was limited to pre-trial discovery only. *Id.* at 235.

[261] *Cf.* United States v. Pulvirenti, 408 F. Supp. 12, 14 (E.D. Mich. 1976) (ordering

While the Supreme Court has not directly confronted a case involving pretrial prosecutorial discovery, several state courts have, with varying results, considered such provisions in state rules. The progressive first steps were taken by California. In *Jones v. Superior Court,*[262] Justice Traynor, writing for the California court, found that the prosecution was entitled to the names of medical experts the defendant intended to call as witnesses, and to X-rays the defendant intended to introduce at trial in an attempt to establish a defense of impotency to a rape charge.[263] Justice Traynor noted that since this information would later be introduced at trial, the privilege against self-incrimination was not violated.[264] Only eight years later, however, California, in *Prudhomme v. Superior Court,*[265] apparently retreated from its position in *Jones.* Reversing a lower court order for the production of a list of alibi witnesses, the court held that the proper test for defense disclosure is "whether disclosure . . . conceivably might lighten the prosecution's burden of proving its case in chief."[266] By setting this rather high standard, *Prudhomme,* while purporting not to do so,[267] has effectively eliminated prosecutorial discovery in California.[268] That the California position is at odds with the view of the Supreme Court may be indicated by the fact that, in the wake of *Williams* and subsequent Supreme Court decisions, California has come to base its standard not on the fifth amendment, but on its equivalent in the California constitution.[269] Similarly divergent opinions exist among the other states.[270] If rule 4.06 is adopted, Mississippi will not be without precedential guidance.

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defendant reciprocally to provide the government with statements of alibi witnesses in a procedure identical to that in the Jencks Act).

[262] 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962) (en banc).

[263] *Id.* at 60-61, 372 P.2d at 922, 22 Cal. Rptr. at 882.

[264] *Id.* at 61, 372 P.2d at 922, 22 Cal. Rptr. at 882.

[265] 2 Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr. 129 (1970).

[266] *Id.* at 326, 466 P.2d at 677, 85 Cal. Rptr. at 133.

[267] *Id.* The *Prudhomme* decision was severely criticized in Rolefson, *Discovery by the Prosecution in Criminal Cases: Prudhomme Reconsidered,* 4 PEPP. L. REV. 17, 29-37 (1976). The author, a deputy district attorney, noted that the trends and cases cited by the California court in *Prudhomme* had not turned out as anticipated, and criticized in anticipation the state constitutional justification for the *Prudhomme* doctrine. *Id.*

[268] Craig v. Superior Court, 54 Cal. App. 3d 416, 425, 126 Cal. Rptr. 565, 569 (1976) (Elkington, J., concurring). Elkington criticized the supreme court's ruling but considered himself bound by the *Prudhomme* standard and concurred in the court's holding that a judge could not require a defendant to produce witness statements even while the defendant was receiving the prosecution's statements. *Id.* at 422, 126 Cal. Rptr. at 567.

[269] Allen v. Superior Court, 18 Cal. 3d 520, 525, 557 P.2d 65, 67, 134 Cal. Rptr. 774, 776 (1976) (en banc).

[270] *See, e.g.,* Scott v. State, 519 P.2d 774, 783 (Alaska 1974) (court denied pre-trial discovery for prosecution on state constitutional grounds, arguing that since pre-trial considerations may not be identical with later developing trial strategy, discovery was not merely an early revelation of evidence); People v. District Court, 187 Colo. 333, 531 P.2d 626, 630-31 (1975) (en banc) (upholding constitutionality of discovery rules requiring the defendant to reciprocally produce medical and scientific reports and to reveal defenses);

Since rule 4.06 provides that the defendant may be subjected to discovery only within constitutional limits,[271] the viability of the rule will be determined by the Mississippi Supreme Court. A literalistic reading of the Mississippi Constitution might cause the court to invalidate the reciprocal criminal discovery provision.[272] It is, however, more desirable that the court enter the mainstream and approve reciprocal discovery.

The basic self-incrimination problem in criminal discovery lies not in the nature of the material the defendant discloses, but in the use to which the prosecution can put that material. Since the information the defendant must reveal will be information he intends to introduce at trial,[273] it can safely be assumed the information will be favorable to the defendant. However, the information revealed may lead the prosecution to incriminating evidence, or at least allow procurement of rebuttal witnesses and statements for the purpose of impeachment. Reciprocal discovery rules are apparently based on the assumption that the fifth amendment does not reach such derivative uses of the discovered material. The Supreme Court has already decided in at least one context that the fifth amendment is not offended by reciprocal discovery. There is no reason why such approval should not also encompass rule 4.06.

3. Provisions of Mississippi Criminal Discovery

Mississippi's criminal discovery rule is fairly clear. Given the absence of state statutory law on most matters covered by the rule, this portion of the Comment will compare the proposed Mississippi provisions with corresponding federal rules and rules in other jurisdictions.

Bowman v. Woodward, 63 Ill. 2d 382, 349 N.E.2d 57, 60 (1976) (upheld discovery rules as limited to materials the defendant intends to utilize at trial); State *ex rel.* Sikora v. District Court, 152 Mont. 241, 462 P.2d 897, 902 (1969) (notice of alibi statute upheld; notice of self-defense and insanity defenses held directory—if the defendant shows good cause, he may present an unrevealed defense at trial); *cf.* State v. Chavers, 294 So. 2d 489, 493-94 (La. 1974) (requirement that defendant disclose relevancy of expected testimony of witness before summons will issue at state expense held not violative of fifth amendment), *cert. denied,* 419 U.S. 1111 (1975).

[271] Miss. Unif. Crim. R. Cir. Ct. Prac. 4.06.

[272] MISS. CONST. art 3, § 26. Such a decision could be based on the wording of § 26, that a defendant "shall not be compelled *to give evidence* against himself." *Id.* (emphasis added). This is somewhat broader than the fifth amendment wording that a defendant shall not be forced "*to be a witness* against himself." U.S. CONST. amend. V (emphasis added). *But cf.,* Allen v. Superior Court, 18 Cal. 3d 520, 525, 557 P.2d 65, 67, 134 Cal. Rptr. 774, 776 (1976) (en banc) (California Supreme Court's standard that defense can be required to disclose that "which 'conceivably might lighten the prosecution's burden of proving its case in chief' " is narrower than the federal law requires).

[273] See note 264 and accompanying text *supra.*

a. Disclosure by the Prosecution

The first portion of rule 4.06 deals with discovery by the defendant of certain materials in the possession of the prosecutor. Under this provision the defendant may request the names and addresses of the prosecution's witnesses, copies of all recorded statements of the defendant, the defendant's criminal record, crime lab or other reports, physical evidence and photos to be introduced at trial, and any exculpatory material.[274]

Although the Mississippi rule is less specific than corresponding rules in some other states,[275] the lack of specificity should have no real effect on the scope of discovery. This assertion, however, could not until recently have been made without qualification. In earlier drafts, the proposed rule required disclosure only of the defendant's written statements. In contrast, the federal rule and the rules in most other states extend discovery to statements that have been taped or otherwise recorded; in addition, the prosecution must provide the substance of any oral statements made by the defendant.[276] Fortunately, the Criminal Law Committee has now amended rule 4.06 so that in this respect it conforms to the mainstream of American criminal procedure rules.[277] Furthermore, in revising this section of 4.06, the Committee has made yet another significant emendation. The phrase "statement from the defendant" now refers to "defendants."[278] By making the term plural, the Committee has extended the scope of discovery to include statements made by codefendants.

Despite these laudatory recent amendments, rule 4.06 does not provide for other modes of criminal discovery available in a number of states. Of particular importance is the requirement in many states that the prosecution disclose all statements of witnesses expected to be used

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[274] Miss. Unif. Crim. R. Cir. Ct. Prac. 4.06. The Criminal Law Committee has accepted a proposed amendment to add another provision requiring prosecutors to disclose expert reports involved in the case. Letter from George Van Zant, *supra* note 122, at 11. This amendment will give more nearly perfect reciprocity with defense disclosure requirements. On February 24, 1979, the Committee amended the rule to include taped or otherwise recorded material and statements by codefendants.

[275] *E.g.*, Mo. R. CRIM. P. 25.32(A)(6) provides that the state shall furnish the defendant, on request, "[a]ny books, papers, documents, photographs or objects which the state intends to introduce into evidence at the hearing or trial." The Mississippi counterpart provides that the state shall, upon request, "[e]xhibit any physical evidence and photos to be offered in evidence." Miss. Unif. Crim. R. Cir. Ct. Prac. 4.06.

[276] *E.g.*, FED. R. CRIM. P. 16(a)(1)(A); ARIZ. R. CRIM. P. 15.1(a)(2) ("Statement" is defined in rule 15.4(a)); COLO. R. CRIM. P. 16 I.(a)(1)(II); FLA. R. CRIM. P. 3.220(a)(1)(iii); IOWA R. CRIM. P. 13(2)(a); KY. R. CRIM. P. 7.24(1)(a); MINN. R. CRIM. P. 9.01, subd. 1(2); MO. R. CRIM. P. 25.32(A)(2); PA. R. CRIM. P. 305(B)(1)(b) (written or oral only); R.I.R. CRIM. P.—SUPERIOR CT. 16(a)(1); WASH. R. CRIM. P. 4.7(a)(1)(ii).

[277] Minutes of Uniform Criminal Rules Committee, February 24, 1979.

[278] *Id.* at 2.

by the prosecution in the course of the trial.[279] Such statements are clearly of considerable value in impeachment.

Another valuable impeachment tool available under the criminal discovery rules of some states is a requirement that the prosecution disclose the criminal records of all intended state witnesses.[280] Moreover, in certain other jurisdictions the defendant may obtain grand jury transcripts[281] as well as information regarding wiretapping and surveillance.[282]

It is not, however, the intent of these remarks to imply that rule 4.06 is in some way anomalous. For the most part the proposed rule is similar to corresponding rules in other states. To take but one example, every rule examined in researching this Comment allows the defendant access to tangible evidence to be offered by the prosecution.[283] Yet, in general, proposed rule 4.06, while containing provisions not found in the rules of some other states,[284] is nevertheless relatively restrictive in its procedures for defense discovery.[285]

Rule 4.06 allows additional discovery by the defendant "as justice may require."[286] This stipulation should give the court sufficient discretion to ensure that a defendant has access to any material vital to his case regardless of whether the material is specifically identified by the

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[279] *E.g.*, ARIZ. R. CRIM. P. 15.1(a)(1); COLO. R. CRIM. P. 16 I(a)(1)(I), (III) (includes statements of witnesses before the grand jury); FLA. R. CRIM. P. 3.220(a)(1)(ii) (this rule encompasses all people who have relevant knowledge of the offense, not just prosecution witnesses); KY. R. CRIM. P. 726(1) (defense gets statements after witness' direct examination); MINN. R. CRIM. P. 9.01, subd. 1(1)(a); MO. R. CRIM. P. 25.32(A)(1), (3) (including prospective witnesses' testimony before the grand jury); PA. R. CRIM. P. 305(B)(2)(b), (c) (discretionary with court and limited to eyewitnesses and coconspirators and accomplices); R.I.R. CRIM. P.—SUPERIOR CT. 16(a)(7); WASH. R. CRIM. P. 4.7(a)(1)(i); *see* 18 U.S.C. § 3500(b) (1976) (federal law requiring prosecution to give defendant any statements of the witness at termination of direct examination).

[280] *E.g.*, COLO. R. CRIM. P. 16 I(a)(1)(VI); MINN. R. CRIM. P. 9.01, subd. 1(1)(a); MO. R. CRIM. P. 25.32(a)(7); R.I.R. CRIM. P.—SUPERIOR CT. 16(a)(8); WASH. R. CRIM. P. 4.7(a)(1)(vi).

[281] *E.g.*, COLO. R. CRIM. P. 16 I(a)(1)(III), (2)(I); MO. R. CRIM. P. 25.32(A)(3); R.I.R. CRIM. P.—SUPERIOR CT. 16(a)(2), (7); WASH. R. CRIM. P. 4.7(a)(1)(iii) (when authorized by court).

[282] *E.g.*, ARIZ. R. CRIM. P. 15.1(b)(1); COLO. R. CRIM. P. 16 I(a)(2)(II); FLA. R. CRIM. P. 3.220(a)(1)(viii); MO. R. CRIM. P. 25.32 (A)(8); PA. R. CRIM. P. 305(B)(1)(g); WASH. R. CRIM. P. 4.7(a)(2)(i).

[283] *E.g.*, FED. R. CRIM. P. 16(a)(1)(c); ARIZ. R. CRIM. P. 15.1(a)(4); COLO. R. CRIM. P. 16I(a)(1)(V); FLA. R. CRIM. P. 3.220(a)(1)(x); IOWA R. CRIM. P. 13(2)(b)(1) (discretionary with court); KY. R. CRIM. P. 7.24(2) (discretionary with court); MINN. R. CRIM. P. 9.01, subd. 1(3); MO. R. CRIM. P. 25.32(A)(6); PA. R. CRIM. P. 305(B)(1)(f); R.I.R. CRIM. P.—SUPERIOR CT. 16(a)(4); WASH. R. CRIM. P. 4.7(a)(1)(V).

[284] To cite one example, MO. R. CRIM. P. 25.32 has no provision providing the defendant with a copy of his criminal record.

[285] An exception is KY. R. CRIM. P. 7.24, 26. FED. R. CRIM. P. 16 is also slightly more restrictive than the Mississippi rule in that witness lists are not discoverable, but the Jencks Act, 18 U.S.C. § 3500 (1976), tends to lessen that impact somewhat.

[286] Miss. Unif. Crim. R. Cir. Ct. Prac. 4.06.

rule. This provision, common in other states,[287] does much to compensate for the somewhat restrictive form of the proposed rule.

b. *Denial of Disclosure*

Rule 4.06 is designed to meet the criticism that criminal discovery will promote intimidation of witnesses or subornation of perjury. The rule will not allow discovery if the court finds a substantial risk that "physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment" would result.[288] The use of discretionary judicial power to prevent abuse of the discovery process is the remedy prescribed by Justice Brennan,[289] an important advocate of criminal discovery. Other states have followed his advice by permitting discretionary denial of discovery.[290]

Another matter closely guarded by discovery rules is the attorney's work product. Since the term "work product," as defined by the Mississippi rule,[291] does not encompass factual material concerning the case, it has been held not to be subject to discovery. This theory dates from the case of *Hickman v. Taylor*,[292] which prevented the disclosure of work product under the Federal Rules of Civil Procedure.[293] The work product exclusion has been criticized on the ground that it tends to be applied too broadly.[294] At times, this objection may be valid. Regardless of such criticism, the work product exclusion rule is common in criminal discovery procedures.[295] It is hoped that the Mississippi rule will prove sufficiently specific to promote a case-by-case analysis.

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[287] *E.g.*, ARIZ. R. CRIM. P. 15.1(e) (substantial need and unable otherwise to obtain information without undue hardship); COLO. R. CRIM. P. 16I(e)(1) (request must be material and reasonable); FLA. R. CRIM. P. 3.220(a)(5); MINN. R. CRIM. P. 9.01, subd. 2 (defense must show the information requested to be relevant); MO. R. CRIM. P. 25.33(a) (information requested must be relevant and material); PA. R. CRIM. P. 305(B)(2)(d); WASH. R. CRIM. P. 4.7(e)(1) (request must be reasonable and relevant).

FED. R. CRIM. P. 16 does not have such a paragraph. The rule has been interpreted to require the government to produce only those items described in subsection (a) of the rule. United States v. Countryside Farms, Inc., 428 F. Supp. 1150, 1155 (D. Utah 1977).

[288] Miss. Unif. Crim. R. Cir. Ct. Prac. 4.06.

[289] Brennan, *supra* note 197, at 294.

[290] *E.g.*, ARIZ. R. CRIM. P. 15.5(a) (authorizing deferral of discovery of witnesses' identities, but not beyond five days before trial); FLA. R. CRIM. P. 3.220(a)(4) (discovery may be restricted or denied—closely worded to Mississippi rule); IOWA R. CRIM. P. 13 (6) (denial or restriction for cause authorized); MINN. R. CRIM. P. 9.01, subd. 3(2) (discovery of witnesses' names and statements can be denied upon certificate of prosecutor); MO. R. CRIM. P. 25.40 (discovery may be denied or regulated, but defendant must receive information in time to make beneficial use thereof); WASH. R. CRIM. P. 4.7 (h)(4) (same).

[291] Miss. Unif. Crim. R. Cir. Ct. Prac. 4.06.

[292] 329 U.S. 495 (1947).

[293] *Id.* at 509-10. FED. R. CIV. P. 26(b)(3) now specifically addresses the work product area. FED. R. CRIM. P. 16(a)(2) provides that work product material is not discoverable.

[294] Rice, *supra* note 198, at 909.

[295] *E.g.*, FED. R. CRIM. P. 16(a)(2); ARIZ. R. CRIM. P. 15.4(b)(1); COLO. R. CRIM. P. 16

Criminal discovery rules also generally protect the identity of a confidential informant used by the state.[296] Again, the Mississippi rule contains guidelines to protect the informant's identity within the constitutional guidelines established by *Roviaro v. United States.*[297] Basically, rule 4.06 simply codifies the case law under *Roviaro* and its progeny.[298]

c. *Disclosure by the Defendant*

Under Mississippi Criminal Rule 4.06, when the defendant requests discovery the prosecution may in turn require the defendant to disclose certain limited information.[299] The defense must disclose the names and addresses of the witnesses it plans to present to prove its case in chief; it must provide the prosecution with physical evidence and photographs; and it must provide any reports of experts prepared for its case.[300]

Two problems arise with respect to this last requirement. First, it is not entirely reciprocal with prosecutorial disclosures, although the rule's fourth prosecution disclosure requirement might encompass the material involved.[301] Second, the requirement of producing experts' reports should apply only to those reports the defendant intends to introduce at trial. Otherwise, the rule goes beyond the boundaries of the constitutional theory on which it is based—that discovery will do nothing more than advance the time of the defense's disclosure.[302] It should be noted that rule 4.06 confines defense disclosure within "constitutional limitations."[303]

That the defense disclosure provisions of rule 4.06 are more circumscribed than the provisions for prosecutorial disclosure results from both the existence of fifth amendment privileges and the fact that the state

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I(f)(1); FLA. R. CRIM. P. 3.220(c)(1); MINN. R. CRIM. P. 9.01, subd. 3(1); MO. R. CRIM. P. 25.39(A); PA. R. CRIM. P. 305(g); R.I.R. CRIM. P.—SUPERIOR CT. 16(d); WASH. R. CRIM. P. 4.7 (f)(1).

[296] *E.g.*, ARIZ. R. CRIM. P. 15.4(b)(2); COLO. R. CRIM. P. 16 I(f)(2); FLA. R. CRIM. P. 3.220(c)(2); MO. R. CRIM. P. 25.39(B); R.I.R. CRIM. P.—SUPERIOR CT. 16(f); WASH. R. CRIM. P. 4.7(f)(2).

[297] 353 U.S. 53 (1957). See notes 215 through 217 and accompanying text *supra.*

[298] The constitutional perimeters of the state's privilege to protect the identity of its confidential informants is discussed in the text accompanying notes 215 through 221 *supra.*

[299] Miss. Unif. Crim. R. Cir. Ct. Prac. 4.06.

[300] *Id.*

[301] That requirement provides for prosecutorial disclosure of crime lab reports or any tests made. *Id.*

[302] This was the fate of a similar provision, COLO. R. CRIM. P. 16II(b), in People v. District Court, 187 Colo. 333, 531 P.2d 626, 630 (1975) (en banc). The court noted that the rule contained the phrase "[s]ubject to constitutional limitations," and held that these limitations meant that only those reports of experts the defendant intended to use at trial need be produced. *Id.*

[303] Miss Unif. Crim. R. Cir. Ct. Prac. 4.06.

generally possesses criminal record files.[304] Nevertheless, under rule 4.06 the prosecution may obtain important material that can expedite the trial. Furthermore, although some states are more demanding of the defense,[305] rule 4.06 is reasonably representative in its balancing of the discovery burdens it imposes on the defense and the prosecution.[306]

The proposed rule is, however, in the minority in that it conditions prosecutorial discovery upon a prior initiation of discovery by the defense.[307] This position is similar to the federal discovery rule[308] and such a procedure does minimize constitutional attacks.[309] Yet, while this conditional discovery technique is the rule in a few states,[310] most jurisdictions have made the prosecution's right of discovery independent of any defense request.[311] The Circuit Judges Conference has nevertheless chosen the more limited rule for Mississippi.

d. Regulatory Procedures

Several regulatory procedures authorized by rule 4.06 serve important functions in the operation of the rule and deserve at least brief consideration.

Rule 4.06 prohibits both parties in a criminal case from refusing to permit their witnesses to discuss the case with the adverse party.[312] This provision is, of course, limited by the fifth amendment privilege against self-incrimination with respect to both the defendant and other poten-

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[304] *But see* MINN. R. CRIM. P. 9.01, subd. 1(5) (if prosecutor gives defendant a copy of his prior criminal record, defense counsel must give prosecution information about all prior convictions known to the defendant).

[305] Most common of the requirements are that the defendant produce the statements of any witnesses he plans to call at trial, *e.g.*, WASH. R. CRIM. P. 4.7(b)(1), and that the defendant give such physical evidence as appearing in a lineup, giving handwriting exemplars, etc., *e.g.*, ARIZ. R. CRIM. P. 15.2(a).

[306] Requiring disclosure of basically the same materials are ARIZ. R. CRIM. P. 15.2(c); COLO. R. CRIM. P. 16 II(b), (c) (not requiring exhibition of tangible items); FLA. R. CRIM. P. 3.220(b)(3), (4); IOWA R. CRIM. P. 13(3) (not requiring witness lists); KY. R. CRIM. P. 7.24(3) (same); MINN. R. CRIM. P. 9.02, subd. 1(1), (2), (3); MO. R. CRIM. P. 25.34(A); PA. R. CRIM. P. 305(C)(2) (discretionary and limited to reports and eyewitnesses); R.I.R. CRIM. P.—SUPERIOR CT. 16(b); WASH. R. CRIM. P. 4.7(b)(1) (limited to list of witnesses).

[307] Miss. Unif. Crim. R. Cir. Ct. Prac. 4.06.

[308] FED. R. CRIM. P. 16(b).

[309] *Id.*, Advisory Comm. Note.

[310] *E.g.*, FLA. R. CRIM. P. 3.220(b)(3), (4); IOWA R. CRIM. P. 13(3); KY. R. CRIM. P. 7.24(3); R.I.R. CRIM. P.—SUPERIOR CT. 16(b).

[311] *E.g.*, ARIZ. R. CRIM. P. 15.2(b), (c); COLO. R. CRIM. P. 16 II(b), (c); MINN. R. CRIM. P. 9.02, subd. 1; MO. R. CRIM. P. 25.34(A); PA. R. CRIM. P. 305(c)(2) (discretionary with court); WASH. R. CRIM. P. 4.7(b)(1).

It can be argued persuasively that the reciprocity requirements of Wardius v. Oregon, 412 U.S. 470, 472 (1973), are met by provisions allowing the defendant the right to discovery, without predicating the prosecution's discovery upon the actual exercise of the right.

[312] Miss. Unif. Crim. R. Cir. Ct. Prac. 4.06.

tial witnesses.[313] This provision will promote full investigation of the case and may well provide an impetus for plea bargaining since each side will know much of its opponent's case.

Rule 4.06 also imposes a continuing duty to disclose relevant material acquired after discovery has begun.[314] These provisions, as well as general discovery mechanisms, allow the criminal trial to become less like a closely guarded poker hand and more like a search for truth.[315] The continuing disclosure provision may also prevent bad faith suppressions of discoverable material upon the claim that the material was found after discovery.[316]

Criminal discovery rules such as rule 4.06 are designed to operate without the intervention of the trial court. Nevertheless, differences of opinion over the duty to disclose may necessitate some degree of judicial involvement. Rule 4.06 provides that any person may, upon showing of good cause, request the court to regulate, defer, or deny discovery.[317] Upon such a request, the judge will examine the questioned material in camera and rule upon its discoverability.[318] A record of the proceedings is made, and, if discovery is regulated or denied, all of the material in question is sealed and preserved for appeal.[319] In such procedures, the court's discretion may be exercised with rather wide latitude.[320] The grounds for denying or restricting discovery are intentionally vague in order to allow the court the opportunity to develop an individualized approach to each case without being rigidly bound by either a highly structured rule or prior case law.[321] Most other states have similar provisions.[322]

The proposed rule does not specifically address the issue of sanctions to be imposed for violations of its provisions. Instead, the court is authorized, in the event of disobedience, to "grant a continuance or to

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[313] *Id.* Several other states have similar provisions. For examples, see COLO. R. CRIM. P. 16 III(a); FLA. R. CRIM. P. 3.220(e); MINN. R. CRIM. P. 9.03, subd. 1; WASH. R. CRIM. P. 4.7(h)(1).

[314] Miss. Unif. Crim. R. Cir. Ct. Prac. 4.06.

[315] *See* Wardius v. Oregon, 412 U.S. 470, 475 (1973) (holding that reciprocal discovery is necessary for fundamental fairness).

[316] Continuing disclosure provisions were very common in the rules the author examined. *E.g.*, FED. R. CRIM. P. 16(c); ARIZ. R. CRIM. P. 15.6; COLO. R. CRIM. P. 16 III(b); FLA. R. CRIM. P. 3.220(f); IOWA R. CRIM. P. 13(5); KY. R. CRIM. P. 7.24(8); MINN. R. CRIM. P. 9.03, subd. 2; MO. R. CRIM. P. 25.37; PA. R. CRIM. P. 305(D); R.I.R. CRIM. P.—SUPERIOR CT. 16(h); WASH. R. CRIM. P. 4.7(h)(2).

[317] Miss. Unif. Crim. R. Cir. Ct. Prac. 4.06.

[318] *Id.*

[319] *Id.*

[320] *Id.*

[321] *Id.*, Annotations.

[322] *E.g.*, ARIZ. R. CRIM. P. 15.5; COLO. R. CRIM. P. 16 III(d), (e), (f); FLA. R. CRIM. P. 3.220(h), (i); IOWA R. CRIM. P. 13(5); KY. R. CRIM. P. 7.24(6); MINN. R. CRIM. P. 9.03, subd. 5, 6, 7; MO. R. CRIM. P. 25.40; PA. R. CRIM. P. 305(F); R.I.R. CRIM. P.—SUPERIOR CT. 16(f); WASH. R. CRIM. P. 4.7(h)(4), (5), (6).

enter such other order as it deems just under the circumstances."[323] Although the rule strongly intimates that a contempt citation should be issued against the noncomplying party's attorney,[324] the matter of sanctions is left completely to the discretion of the judge.

In other jurisdictions, failure to comply with the rules of criminal discovery may result in a variety of penalties including the granting of a continuance,[325] the exclusion of witnesses, evidence or defenses not disclosed,[326] declaration of a mistrial,[327] dismissal of the action,[328] citation for contempt,[329] and denial of further disclosure to the noncomplying party.[330]

Although Mississippi circuit judges might properly utilize any of these strictures, it is important to note that particularly when the exclusion of evidence, witnesses, or defenses is contemplated as a punishment, the court must proceed with caution.[331] For example, although Florida specifically permits the punitive exclusion of witnesses or materials,[332] a procedure has been developed by its courts to determine whether such an exclusion is an appropriate sanction. In *Raminez v. State*[333] this test is cogently articulated:

> [T]he court's decision can be properly exercised only after the court has made an adequate inquiry into all of the surrounding circumstances. Without intending to limit the nature or scope of such inquiry, we think it would undoubtedly cover at least such questions as whether the state's violation was inadverdent or wilful, whether the violation was trivial or substantial, and most importantly, what effect, if any, did it have upon the ability of the defendant to prepare for trial.[334]

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[323] Miss. Unif. Crim. R. Cir. Ct. Prac. 4.06.

[324] *Id.*

[325] *E.g.*, FED. R. CRIM. P. 16(d)(2); ARIZ. R. CRIM. P. 15.7(a)(2); COLO. R. CRIM. P. 16 III(g); FLA. R. CRIM. P. 3.220(j)(1); IOWA R. CRIM. P. 13(6)(c); KY. R. CRIM. P. 7.24(9); MINN. R. CRIM. P. 9.03, subd. 3; PA. R. CRIM. P. 305(E); R.I.R. CRIM. P.—SUPERIOR CT. 16(i); WASH. R. CRIM. P. 4.7(h)(7)(i).

[326] *E.g.*, FED. R. CRIM. P. 16(d)(2); ARIZ. R. CRIM. P. 15.7(a)(4); COLO. R. CRIM. P. 16 III(g); FLA. R. CRIM. P. 3.220(j)(i); IOWA R. CRIM. P. 13(5)[sic](c); KY. R. CRIM. P. 7.24(9); PA. R. CRIM. P. 305(E) (other than the defendant's testimony); R.I.R. CRIM.. P.—SUPERIOR CT. 16(i).

[327] *E.g.*, ARIZ. R. CRIM. P. 15.7(a)(5); FLA. R. CRIM. P. 3.220(j)(1).

[328] *E.g.*, WASH. R. CRIM. P. 4.7(h)(7)(i).

[329] *E.g.*, ARIZ. R. CRIM. P. 15.7(a)(3); FLA. R. CRIM. P. 3.220(j)(2) (against counsel only); MINN. R. CRIM. P. 9.03, subd. 8; WASH. R. CRIM. P. 4.7(h)(7)(ii) (counsel may be subjected to "appropriate sanctions").

[330] *E.g.*, ARIZ. R. CRIM. P. 15.7(b).

[331] Although the exclusion of defenses is possible under rule 4.06, it is more likely to occur directly under Miss. Unif. Crim. R. Cir. Ct. Prac. 4.07(5) (notice of alibi defense) and 4.08(2)(6) (notice of insanity defense).

[332] FLA. R. CRIM. P. 3.220(j)(1).

[333] 241 So. 2d 744 (Fla. Dist. Ct. App. 1970).

[334] *Id.* at 747.

If under this analysis no prejudice is shown to the trial preparation of the appealing party, reversal would be deemed inappropriate.[335] In its recognition of the many factors to be considered in the punitive suppression of evidence, this Florida rule should be instructive to Mississippi courts in their efforts to promulgate sanctions for violations of rule 4.06. Indeed, the Florida requirement, that prejudice be shown before a denial of discovery will require reversal, is similar to the rule in Mississippi for motions for production of tangible evidence.[336] By attempting to synthesize this Florida rule with Mississippi's own "harmless error" standard, both defendants and the state can be provided safeguards against injustice.

4. Conclusions Regarding Criminal Discovery

Although proposed rule 4.06 is somewhat more limited than corollary provisions in some other states,[337] the rule does provide Mississippi with a much needed expansion of criminal discovery. Particularly where indigent defendants are involved, the adoption of the rule will equalize investigative opportunities.[338] With both parties in full possession of the facts, plea bargaining should be stimulated;[339] and, if the case does go to trial, better cases should be presented to the jury. Since rule 4.06 grants the judge the authority to limit discovery when he finds it necessary,[340] the problems associated with subornation of perjury and the "elimination" of witnesses before trial can be minimized. In general, rule 4.06 represents a substantial step forward in the modernization of Mississippi criminal procedure.

Conclusion

Both in their content and the mode of their enactment the Mississippi Uniform Criminal Rules have generated controversy. Yet, as established by *Newell*[341] and its progeny, circuit court judges possess the

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[335] *Id.* at 747-48.

[336] See note 227 and accompanying text *supra.*

[337] For example, the Mississippi rule conditions prosecution discovery upon defense discovery, in contrast to some states, see note 310 and accompanying text *supra.* Also, Mississippi has only very limited availability of witness statements for the defendant and none for the prosecution. Most states' rules make statements of intended witnesses for either party available to the other. See note 279 and accompanying text *supra.*

[338] *See* Rice, *supra* note 198, at 912 (liberal discovery is becoming a necessity for adequate defense investigation).

[339] In his article, Rice argues that the ability of prosecutors to disclose varying amounts of their cases in plea bargaining can result in uninformed plea bargaining results. He remarks, "[W]ithout full disclosure by the state, plea bargain justice may produce disposition of little more than 'bargain basement' quality." *Id.* at 911.

[340] Miss. Unif. Crim. R. Cir. Ct. Prac. 4.06.

[341] Newell v. State, 308 So. 2d 71, 76 (Miss. 1975).

constitutional power to promulgate new rules. Moreover, the legislature, in attempting to regulate this power, has implicitly recognized its existence.[342]

In substance, the rules represent a significant recodification and modernization of Mississippi criminal procedure, collecting the significant statutory and case law in one well-organized volume. The proposed rules do not introduce strange or radical procedures; rather, the rules for the most part simply follow practices already established in many other states. Another major advantage of the rules is that the Criminal Law Committee of the Circuit Judges Conference is a continuing body which can amend the rules as the need arises. The Mississippi Uniform Criminal Rules should, when the procedure for approval is completed, provide for Mississippi attorneys a progressive and workable system of criminal rules for use in the circuit courts.

Rowland H. Geddie III

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[342] S.B. 2764, 1978, Miss. Reg. Sess. See section II. *supra.*

ILLEGAL IMMIGRATION: SHORT-RANGE SOLUTION OF EMPLOYER SANCTIONS

The number of illegal aliens[1] working in the United States is estimated to be in the millions.[2] This large influx of undocumented workers has had a great impact from both short-term and long-term perspectives. One particularly difficult problem has faced Congress throughout the history of the immigration laws—the problem of satisfying employers with adequate numbers of willing, qualified workers, while at the same time guaranteeing protection in the labor market to American and legal alien workers.[3]

Employers are often unable to find United States citizens who are willing and able to do necessary work. These employers, who are forced to seek alien employees to meet labor requirements, complain with some justification that the laws providing for employment of needed alien labor are arbitrarily applied. At the same time the government's refusal during the last two decades to enact sanctions against the hiring of illegal aliens illustrates the fact that in the political field the interests of employers have too long overshadowed the interests of both domestic and alien workers. The safeguards provided for American and legal alien workers in the labor market must be balanced against employers' needs. The position of this Comment is that these interests should be balanced by guaranteeing that the employers' legitimate business needs can be fulfilled with certified legal alien workers, and by destroying the employers' incentive to hire illegal aliens. In line with this contention, proposed legislation[4] which imposes sanctions on employers of illegal aliens is supported as a short-term solution to the problems of increased illegal immigration.

Because the majority of illegal entrants are from Mexico,[5] this

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[1] The term illegal alien refers to foreign nationals who have come to the United States without proper documentation in violation of 8 U.S.C. §§ 1101-1503 (1976). Catz, *Regulating the Employment of Illegal Aliens: De Canas and Section 2805*, 17 SANTA CLARA L. REV. 751, 751 n.1 (1977). Illegal aliens are commonly referred to by such derogatory terms as "wetbacks" or "alambristas." *See, e.g.*, Ortega, *Plight of the Mexican Wetback*, 58 A.B.A.J. 251, 251 (1972) (termed "wetback," or "mojado" or "alambristas"); Note, *Commuters, Illegals and American Farmworkers: The Need for a Broader Approach to Domestic Farm Labor Problems*, 48 N.Y.U.L. REV. 439, 480 (1973) (illegal aliens termed "alambristas" (fence jumpers) or "wetbacks").

[2] See note 32 and accompanying text *infra*.

[3] *See, e.g.*, Silva v. Secretary of Labor, 518 F.2d 301, 310 (1st Cir. 1975) (court interpreting 8 U.S.C. § 1182(a)(14) does not decide to what degree employers' needs are subordinated to needs of American labor); Digilab, Inc. v. Secretary of Labor, 495 F.2d 323, 326 (1st Cir.) (legislative objective to balance need for full employment and industry's need for workers), *cert. denied*, 419 U.S. 840 (1974).

[4] S. 2252, 95th Cong., 1st Sess. (1977).

[5] United States v. Baca, 368 F. Supp. 398, 402 (S.D. Cal. 1973) (approximately 85%

paper will focus on illegal Mexican workers. Following a brief historical overview and analysis of the phenomenon of illegal Mexican immigration, the strengths and weaknesses of present laws and proposed legislation will be examined.

I. HISTORICAL BACKGROUND

A. Origin of Immigration Laws and Politics

Prior to 1875 the United States imposed no restrictions on immigration;[6] in fact, early legislation encouraged immigrants to come to this country.[7] Furthermore, the Supreme Court eliminated barriers to immigration by ruling that state attempts to regulate or tax aliens are unconstitutional violations of the commerce clause.[8] In addition, the first federal immigration laws, whose sole purpose was to prevent the entry of undesirable aliens into the United States, were not numerically restrictive.[9]

As early as 1884 domestic labor representatives complained of the effect of immigration on wages, and Congress responded with the Contract Labor Law of 1885.[10] Subsequently, because of increased opposition to immigration during World War I, the Immigration Act of 1917 was passed.[11] Not until 1921, however, was the first quota law passed,[12]

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of illegal aliens are citizens of Mexico) (citing DEP'T OF JUSTICE, SPECIAL STUDY GROUP ON ILLEGAL IMMIGRANTS FROM MEXICO, A PROGRAM FOR EFFECTIVE AND HUMANE ACTION ON ILLEGAL MEXICAN IMMIGRANTS 6 (1973)).

[6] *See* Salinas & Torres, *The Undocumented Mexican Alien: A Legal, Social, and Economic Analysis*, 13 HOUS. L. REV. 863, 866 (1976); Note, *Immigrants, Aliens & Constitution*, 49 NOTRE DAME LAW 1075, 1076 (1974).

[7] *See* Act to Encourage Immigration, ch. 246, 13 Stat. 385 (1864) (repealed Mar. 30, 1868) (immigrants were exempted from military services). For a general survey of early federal legislation, *see generally* H.R. REP. No. 1365, 82d Cong., 2d Sess. 6-9, *reprinted in* [1952] U.S. CODE CONG. & AD. NEWS 1653, 1655-57.

[8] *See* Henderson v. Wickham, 92 U.S. 259, 275 (1876); Smith v. Turner, 48 U.S. (7 How.) 283, 409 (1849). *See also* Salinas & Torres, *supra* note 6, at 867.

[9] H.R. REP. No. 1365, 82d Cong., 2nd Sess. 11, *reprinted in* [1952] U.S. CODE CONG. & AD. NEWS 1653, 1660. For exemplary statutes, see Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084 (current version at 8 U.S.C. § 1182(a)(6) (1976)) (exclusion of immigrants with contagious disease); Act of Aug. 3, 1882, ch. 376, 22 Stat. 214 (repealed) (exclusion of paupers, lunatics, and idiots); Act of Mar. 3, 1875, ch. 141, 18 Stat. 477 (repealed 1974) (exclusion of convicts and prostitutes).

[10] Act of Feb. 26, 1885, ch. 376, 23 Stat. 332 (repealed 1952) (unlawful to import aliens under contract unless alien was an artist, lecturer, servant or skilled in a developing industry).

[11] Act of Feb. 5, 1917, ch. 29, 39 Stat. 874 (repealed 1952); *see* 1 C. GORDON & H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE § 2.40 (1975) (protection of labor as goal of Immigration Act of 1917).

[12] Act of May 19, 1921, ch. 8, 42 Stat. 5 (repealed 1952) (no more than 3% of foreign-born persons from a particular European nation already in the United States in 1910 could

and the national origins quota system followed in 1924.[13]

B. Mexican Immigration

1. Bracero Program

Although the 1924 quota did not apply to inhabitants of the western hemisphere,[14] undocumented entries by Mexicans became noticeable in the late 1920s and had reached alarming proportions by the end of World War II.[15] To meet the demand for foreign labor, the federal government sought to utilize the ever-increasing influx of illegal aliens by establishing the Bracero Program.[16] Mexicans registered under the Bracero Program were allowed to come to the United States to perform temporary farm work.[17] By advertising that labor was in demand, however, the program resulted in increased illegal entries since entering the job market illegally was simpler for the alien than going through the program itself.[18]

To counteract the growing number of illegal Mexican immigrants, the Immigration and Naturalization Service (INS) in 1954 implemented "Operation Wetback," a program of mass deportation.[19] The Bracero Program was finally allowed to expire at the end of 1964.[20]

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emigrate from that nation).

[13] Act of May 26, 1924, ch. 190, 43 Stat. 153 (repealed 1952) (quota for each nationality in eastern hemisphere based on number of immigrants of that nationality immigrating to the United States as of 1920, with a ceiling of 150,000 and floor of 100).

[14] *Id.;* S. REP. No. 748, 89th Cong., 1st Sess., *reprinted in* [1965] U.S. CODE CONG. & AD. NEWS 3328, 3335.

[15] Note, *supra* note 1, at 480. For an outline of Mexican immigration patterns, see Salinas & Torres, *supra* note 6, at 868-73.

[16] Act of Aug. 4, 1942, ch. 56, Stat. 1759 (amended by Act of Apr. 26, 1943, ch. 57, Stat. 1152). For an explanation of the program, *see generally* Salinas & Torres, *supra* note 6, at 870-72. The program was later renewed by Act of July 12, 1951, ch. 223, 65 Stat. 119 (current version at 7 U.S.C. §§ 1461-1468 (1964)). For a discussion of the operation and defects of the Contract and Bracero Programs, see Note, *Wetbacks: Can States Act to Curb Illegal Entry?*, 6 STAN. L. REV. 287, 296-301 (1954).

[17] *See* Salinas & Torres, *supra* note 6, at 871 n.68.

[18] *See* Salinas & Torres, *supra* note 6, at 870-71 (citing [1974] INS. ANN. REP. 84) (over three million illegal aliens were apprehended from 1951-1954). *But see* Note, *supra* note 1, at 480 (Bracero Program reduced number of illegal entries by providing alternative of legal employment).

[19] *See* Salinas & Torres, *supra* note 6, at 874-75. Over one million Mexicans were deported under this project. *Id.*

[20] *See* 8 U.S.C. § 1461 (1964) (note following the statute explained that if the program was not renewed, it would expire on December 31, 1964, according to Act of Dec. 13, 1963, Pub. L. No. 88-203, 77 Stat. 363.

2. Commuters

Following the termination of the Bracero Program, the Immigration and Nationality Act (INA)[21] was amended[22] to provide a separate quota system for the western hemisphere.[23] This amendment did not, however, change the long-standing practice of legally allowing Mexican nationals to work in the United States as commuters.[24] Unlike the Bracero Program, commuter practice is not based on any statutory or regulatory authorization from Congress.[25] Instead, the INS has on its own initiative classified the approximately 55,000 Mexican daily and seasonal commuters[26] as aliens "lawfully admitted for permanent residence" who are "returning from a temporary visit abroad."[27] Under this classification, commuters are "returning resident immigrants" who may be admitted under informal requirements[28] by displaying an Alien Registration Receipt Card.[29] The courts have upheld the INS commuter classification against the contention of domestic labor groups that commuters should

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[21] 8 U.S.C. §§ 1101-1503 (1976) (originally enacted as Act of June 27, 1952, ch. 477, 66 Stat. 166).

[22] 8 U.S.C. § 1151 (1964) *as amended by* Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911.

[23] *Id.* For a discussion of the quota and the deficiencies in the 1965 amendment, see Gordon, *The Need to Modernize Our Immigration Laws,* 13 SAN DIEGO L. REV. 1, 15-17 (1975).

[24] Note, *supra* note 1, at 463. In 1927 the Department of Labor issued General Order 86, which subjected commuters to quota restrictions and forced aliens to set up actual permanent residence or get a new visa for each entry into the United States. Citizens from nonquota countries such as Canada or Mexico could continue to commute without restriction. Since the 1952 INA did not restrict the commuter practice and the practice had been acknowledged in hearings, the INS interpreted the INA of 1952 as giving approval to commuter status. Comment, *Aliens in the Fields: The "Green Card Commuter" Under the Immigration and Naturalization Laws,* 21 STAN. L. REV. 1750, 1752-55 (1969).

Although the amendment eliminated the very language the INS had previously used to justify the commuter status, the INS continued the practice because it would have been too complex and dangerous to terminate the vast program that had acted as a substitute for the terminated Bracero Program. Greene, *Public Agency Distortion of Congressional Will: Federal Policy Toward Non-Resident Alien Labor,* 40 GEO. WASH. L. REV. 440, 443 (1972).

[25] *See* Greene, *supra* note 24, at 442.

[26] *See* Note, *supra* note 1, at 459 n.138 (figures represented minimum estimates in 1973).

[27] *See* E. HARPER, IMMIGRATION LAWS OF THE UNITED STATES § 2(d) (3d ed. 1975) (discussion of INS interpretation of 8 U.S.C. § 1101(a) (27)(B) (1976)); Greene, *supra* note 24, at 443 (same).

[28] *See* 8 U.S.C. § 1181(b) (1976). Resident immigrants returning under the conditions stated in the regulations are not required to obtain a passport, visa, or other documentation. *Id.*

[29] 8 C.F.R. § 211.1(b) (1978). Commuters were once called "green-card commuters" because the cards were formerly green. Comment, *supra* note 24, at 1750.

not be exempt from normal documentation and certification procedures.[30] The courts have ruled, however, that commuter status is limited to citizens of Canada and Mexico.[31]

II. Causes of Increased Illegal Immigration

There are no exact statistics on the number of illegal aliens in this country. Estimates of the number vary from four to twelve million.[32] Eighty-nine percent of the illegal aliens apprehended each year are Mexicans,[33] and most of these aliens are involved in agriculture.[34] Factors such as the difficulty and expense of certification procedures[35] and the limited success of the border patrol[36] have certainly contributed to the increase in undocumented entries. Primarily, however, Mexican aliens continue to come to America illegally for social and economic reasons.[37] Many commentators and authorities who have examined the social and economic causes discuss this influx in terms of "push-pull" factors,[38] which are discussed and analyzed below.

A. Push Factors

Push factors, such as Mexico's high unemployment level[39] and poor

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[30] *See, e.g.*, Saxbe v. Bustos, 419 U.S. 65, 71-72 (1974) (rejecting argument that commuters were nonimmigrant temporary workers under 8 U.S.C. § 1101(a)(15)(H)(ii) (1970)); Gooch v. Clark, 433 F.2d 74, 82 (9th Cir. 1970) (commuters not subject to certification), *cert. denied sub. nom.* Gooch v. Mitchell, 402 U.S. 995 (1971).

[31] Alvarez v. Dist. Dir. of INS, 539 F.2d 1220, 1224 (9th Cir. 1976).

[32] Chapman, *A Look at Illegal Immigration: Causes and Impact on the United States*, 13 San Diego L. Rev. 34, 35 (1976); *see* United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975) (eight to twelve million); *Proposed Amendments to the Immigration and Nationality Act: Hearings on S. 3074 Before the Subcomm. on Immigration and Naturalization of the Senate Comm. on the Judiciary*, 94th Cong., 2d Sess. 66 (1976) (INS estimated eight million in 1975); *cf.* Manulkin & Maghame, *A Proposed Solution to the Problem of the Undocumented Mexican Alien Worker*, 13 San Diego L. Rev. 42, 44 (1975) (conservative estimate of one to two million).

[33] Material Concerning Immigration Proposals Prepared for Judiciary Committee, United States Senate (May 1978) (unpublished testimony for the Senate Judiciary Committee's hearings on Senate Bill 2252 prepared by the American Friends Service Committee and Mexican Friends Service Committee and on file with the *Mississippi Law Journal*).

[34] *See* Nafziger, *A Policy Framework for Regulating the Flow of Undocumented Mexican Aliens in the United States*, 56 Or. L. Rev. 63, 86 (1977) (almost 75% seek farm work; the rest are blue collar or domestic service workers); Note, *supra* note 1, at 481 (72% working or seeking to find farm work). *Contra*, Chapman, *supra* note 32, at 38 (because of mechanization, only about 33% in agriculture).

[35] See notes 95 through 97 and accompanying text *infra*.

[36] See note 109 and accompanying text *infra*.

[37] *See generally* Chapman, *supra* note 32, at 35.

[38] *E.g.*, Nafziger, *supra* note 34, at 86-88; Note, *supra* note 16, at 294-95.

[39] Material Concerning Immigration Proposals, *supra* note 33 (quoting El Sol De

economic conditions, force Mexicans to seek a place where they can live and work without fear of starvation.[40] The increased industrial development along the Mexican-American border contributes to undocumented entry by drawing workers northward.[41] In addition, the high population growth rate in Mexico is one of the most significant push factors.[42] Mexico, with a population of around sixty-three million, is presently the world's tenth largest nation and its population is expected to double in less than twenty-five years.[43] This overpopulation continues to flood the Mexican labor market—a market already burdened with an overwhelming unemployment and underemployment rate of nearly fifty percent.[44] Furthermore, economic conditions such as devaluation of the peso and governmentally imposed wage ceilings also help to drive Mexicans across the border.[45]

B. Pull Factors

Pull factors, which arise in the United States, consist of the availability of jobs, higher wages, and better working conditions.[46] These factors act as magnets, drawing Mexicans across the border with or without documentation.[47] Because of the increased availability through radio and television of information concerning the lifestyle in the United States, many aliens view life at the bottom of the American economic scale as an improvement over living in Mexico.[48]

Once a Mexican has illegally immigrated, he can easily blend into America's ethnically diverse population.[49] Illegal entry is generally not

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Mexico, Mexico City, Dec. 26, 1977).

[40] Materials Concerning Immigration Proposals, *supra* note 33 (quoting Exelsior, Mexico City, March 10, 1978); Manulkin & Maghame, *supra* note 32, at 45 n.10.

[41] *See* Note, *supra* note 1, at 481.

[42] *See Hearings on S. 2252 Before the Senate Comm. on the Judiciary.* 95th Cong., 2d Sess. (May 10, 1978) (unpublished statement of Warren Christopher at 7) (growth rate of over 3% introduces an estimated 800,000 job seekers into the labor market annually).

[43] *Hearings on S. 2252, supra* note 42 (May, 1978) (unpublished statement of Sen. Harrison Schmitt at 10).

[44] *Hearings on S. 2252, supra* note 42 (May 10, 1978) (unpublished statement of Warren Christopher at 7).

[45] Materials Concerning Immigration Proposals, *supra* note 33; Manulkin & Maghame, *supra* note 32.

[46] *See* Nafziger, *supra* note 34, at 87 (economic factors combined with lack of legal method of entry because of restrictive immigration laws); Note, *supra* note 16, at 295 (economic growth and change in farm labor needs produce jobs which lure Mexicans).

[47] See note 46 and accompanying text *supra.*

[48] Chapman, *supra* note 32, at 36; *see* Nafziger, *supra* note 34, at 87-88 (psychological factors shape "motivations, aspirations, and overall personalities").

[49] Diaz v. Kay-Dix Ranch, 9 Cal. App. 3d 588, 594, 88 Cal. Rptr. 443, 447 (1970); *Hearings on S. 2252, supra* note 42 (May 10, 1978) (unpublished statement of Warren Christopher at 4).

an obstacle to the alien's finding employment since he can easily acquire a social security card to present to prospective employers.[50] Partially because of a lack of employer sanctions, illegal aliens are readily hired in the large unskilled labor market.[51] Furthermore, the lingering effects of the Bracero Program continue to pull Mexicans into the United States illegally.[52]

III. Impact of Illegal Immigration

Because of the difficulties involved in compiling numerical evidence that accurately reflects the scope of this problem, the impact of illegal immigration must be discussed in terms of estimations and probabilities.[53] While the most dramatic effects have been economic in nature, the social and political impact attributed to the influx of illegal aliens must also be considered.

A. Economic Impact

Authorities disagree concerning the actual impact illegal aliens have on the economy of the United States. Major areas of impact have, however, been identified. The five most important of these areas are discussed separately below.

1. Wages and Job Displacement

Some commentators have stated that illegal alien workers unquestionably have an adverse effect on wages and working conditions.[54] Other writers, however, remain skeptical.[55] At one time, it was thought that this depressing of wages was limited to the agricultural industry.[56] Agricultural employers have continually argued that because American labor refuses to perform menial agricultural work, the hiring of illegal aliens prevents what would otherwise be a labor shortage.[57] This argu-

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[50] *See* Diaz v. Kay-Dix Ranch, 9 Cal. App. 3d 588, 599, 88 Cal. Rptr. 443, 449-50 (1970) (fraudulent use of social security card and employers' willingness to hire facilitate entry). The Social Security Administration issues cards and account numbers to illegal entrants with no inquiry as to alienage or immigration status. *Id.* at 588, 88 Cal. Rptr. at 449.

[51] *Id.*, 88 Cal. Rptr. at 449.

[52] Note, *supra* note 1, at 482.

[53] *Hearings on S. 3074*, *supra* note 32, at 66 (statement of James L. Buckley).

[54] *E.g.*, Salinas & Torres, *supra* note 6, at 876; Note, *supra* note 16, at 288.

[55] *E.g.*, Nafziger, *supra* note 34, at 70-71 (illegal aliens take unpleasant and difficult jobs that American citizens would not accept).

[56] *See* Note, *supra* note 1, at 482 (illegal aliens usually have agrarian background with predisposition to farm labor); Note, *supra* note 16, at 288 (low wages paid to "wetbacks" depress wages of American farm workers).

[57] Manulkin & Maghame, *supra* note 32, at 48.

ment has been partially refuted, however, by recent studies revealing that many illegal aliens reside in major cities and hold jobs in various industries.[58]

In the 1950s it was estimated that in areas of high concentration of illegal aliens, undocumented alien farmworkers received average salaries of twenty-five to fifty cents per hour.[59] According to INS statistics for the 1977 fiscal year, 55% of the apprehended aliens who were employed earned between $2.50 and $4.49 per hour, and 33% received less than $2.50 per hour.[60] Illegal aliens usually work longer hours and are paid lower wages than their American co-workers.[61] As a result, wages are depressed and working conditions remain substandard for both legal and illegal workers in areas where illegal aliens are employed in large numbers.[62]

Statistics show a correlation between areas where apprehension of illegal aliens is high and areas of high unemployment.[63] Since the American unemployment rate is substantial,[64] this correlation has stimulated controversy. In a recent statement before the Senate Judiciary Committee, the Secretary of Labor explained that the unemployment problem is attributable to an increase in the size of the labor market rather than to a stagnant economy.[65] Other commentators allege that, to obscure the carelessness and mismanagement apparent in American economic policies, aliens have been made scapegoats for the unemployment prob-

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[58] *See Hearings on S. 2252, supra* note 42 (May 17, 1978) (unpublished statement of Ronald H. Brown at 7). The following statistics compiled by the INS reflect the type of employment of aliens apprehended in the 1977 fiscal year: 2% (5,411) in heavy industry, 5% (16,000) in construction, 31% (85,000) in light industy, 45% (122,000) in agriculture. *Id.*

[59] Note, *supra* note 16, at 288-89.

[60] *Hearings on S. 2252, supra* note 42 (May 17, 1978) (unpublished statement of Ronald H. Brown at 7). Eight percent of the apprehended aliens earned between $4.50 and $6.49 per hour, and two percent earned $6.50 per hour or over. *Id.*

[61] *Id.* at 8. This is true, although the American coworkers are often subject to the same exploitative practices. *Id.*

[62] *Hearings on S. 3074, supra* note 32, at 149 (statement of Andrew J. Biemiller); Salinas & Torres, *supra* note 6, at 876-77.

[63] *Hearings on S. 3074, supra* note 32, at 66 (influx of illegal aliens significantly contributes to the unemployment rate) (statement of James L. Buckley).

[64] Though the Department of Labor's official statistics indicate that the unemployment rate in the United States is around 7%, the unofficial statistics of the National Urban League show that the rate is over 13%. *Hearings on S. 2252, supra* note 42 (May 17, 1978) (unpublished statement of Ronald H. Brown at 6).

[65] *Hearings on S. 2252, supra* note 42 (May 11, 1978) (unpublished statement of Ray Marshall at 5) (three million new jobs were created in 1977 without a corresponding decline in unemployment). In his testimony the Secretary of Labor recognized that many factors contributed to this increase in the labor force, but stated that the influx of undocumented workers into the labor market was an important element in this growth. *Id.*

lem.[66] The Department of Labor does not claim that there is a one-to-one displacement of legal workers by illegal workers, but it rejects the idea that illegal aliens are mere scapegoats or mythical causes of our economic woes.[67]

2. Tax Avoidance

The INS has estimated that at least one hundred fifteen million dollars in tax revenues is lost each year because undocumented aliens and their employers often do not pay federal, state and local income taxes.[68] In recent hearings before the Senate Judiciary Committee, however, Senator Schmitt stressed that illegal aliens pay state and local sales taxes, and that at least two-thirds of them have social security and federal income taxes deducted from their wages.[69] These taxes, paid on wages earned locally, amount to nearly forty-nine million dollars annually.[70] Thus, in this area—as in so many problem areas where aliens are viewed as sinister causes—it is difficult to judge whether the alien is being used as a scapegoat, or whether the loss of tax revenues does in fact outweigh the illegal alien's contribution to the economy.[71]

3. Balance of Payments

Closely related to the allegation of tax avoidance is the charge that illegal aliens, by sending most of their earned money back to Mexico, contribute to the United States' balance of payment deficit. In the early

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[66] *Hearings on S. 3074, supra* note 32, at 205 (focusing on the alien as a cure for unemployment in making him the "scapegoat for carelessness") (statement of David Carliner); *see* Nafziger, *supra* note 34, at 68 (news media deemed aliens "a minor scapegoat in the economic recession").

[67] *Hearings on S. 2252, supra* note 42 (May 11, 1978) (unpublished statement of Ray Marshall). The Secretary stated that the continued availability of undocumented workers throughout low-wage job markets acts as a force which perpetuates the low level of wages, poor working conditions, and inefficiently structured employment. *Id.*

[68] *Hearings on S. 3074, supra* note 32, at 66 (statement of James L. Buckley). The federal government loses one hundred million dollars and state governments lose fifteen million dollars. Salinas & Torres, *supra* note 6, at 880.

[69] *Hearings on S. 2252, supra* note 42 (May, 1978) (unpublished statement of Sen. Harrison Schmitt at 3).

[70] *Id.* at 4.

[71] Senator Schmitt quoted the following statement from the Wall Street Journal:

> What about the state and federal taxes withheld from paychecks of illegals working here, taxes that pay for benefits most never receive? What about their productivity and its impact on keeping prices down and businesses healthy? Is the alien a huge financial drain or does he actually pay his own way? 'No one knows,' concedes . . . the new Chief of the INS.

Wall St. J., Sept. 7, 1977, *cited in Hearings on S. 2252, supra* note 42 (May, 1978) (unpublished statement of Sen. Harrison Schmitt at 4); *see* Nafziger, *supra* note 34, at 75 (INS has insufficient data to estimate the amount and effect of tax evasion).

1950s it was estimated that illegal Mexican immigrants drained five million dollars a week from the United States economy.[72] Today, the adverse impact of illegal aliens on commerce and the balance of payments is still difficult to assess.[73] For this reason, it has been suggested that, here again, the INS has made the illegal alien a scapegoat for poor economic policy.[74]

4. Cost to Federal Government

Although illegal aliens cannot receive benefits from the Supplemental Security Income, Aid to Families with Dependent Children, and Medicaid Programs under existing law,[75] it has been alleged that the aliens constitute a serious financial drain on such agencies.[76] The most recent and comprehensive studies indicate, however, that the illegal Mexicans' unlawful use of social welfare services is far outweighed by their contributions to social security and taxes.[77] The Commissioner of Social Security informed the Senate Judiciary Committee that as of May, 1978, "only an insignificant fraction of one percent of all applicants are undocumented aliens who succeed in receiving assistance" under the SSI, AFDC and Medicaid Programs.[78] In addition, the Commissioner outlined new procedures that make it more difficult for illegal aliens to obtain social security numbers fraudulently.[79]

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[72] *See* Note, *supra* note 16, at 293.

[73] *See* Salinas & Torres, *supra* note 6, at 880 (illegal aliens create one billion dollars of the national deficit).

[74] *See* Nafziger, *supra* note 34, at 74-75.

[75] 42 U.S.C. § 1382c (a)(1)(B) (1976) (to receive S.S.I. payments the individual must be a "resident of the United States, and . . . either (i) a citizen or (ii) an alien lawfully admitted"); 45 C.F.R. § 233.50 (1976) (same for A.F.D.C.); 45 C.F.R. § 248.50 (1976) (same for Medicaid).

[76] *See* Salinas & Torres, *supra* note 6, at 879 (aliens have both direct and indirect impact on public assistance programs).

[77] One study indicates that only about 4% of illegal Mexicans have ever received welfare benefits. While these payments amount to approximately two million dollars per year, this cost is outweighed by the nearly fifty million dollars the illegal aliens pay in taxes. Dr. Wayne Cornelius, Study on Illegal Aliens (Massachusetts Institute of Technology), *cited in Hearings on S. 2252, supra* note 42 (May, 1978) (unpublished statement of Sen. Harrison Schmitt at 3-4).

[78] *Hearings on S. 2252, supra* note 42 (May 11, 1978) (unpublished statement of Don I. Wortman at 2).

[79] *Id.* at 8. Mr. Wortman described the following procedures: (1) evidence of age, identity and citizenship or alien status will be required of all applicants for social security numbers, (2) a personal interview will be conducted with all applicants 18 years of age or older, (3) employee accountability will be established, and (4) agencies issuing numbers to AFDC recipients will be required to conform to these requirements. *Id.* In addition to this issuance process, the development and issuance of a "tamper-proof" social security card is projected by 1980. *Id.*; *see* 42 U.S.C. § 405(c)(2)(B)(i)(I) (1976) (Secretary shall

5. Cost to Local Government

Perhaps the most legitimate complaints on the cost of maintaining illegal aliens come from the municipal and county governments that provide health, education, and welfare services, and police and fire protection.[80] Applied to areas with high concentrations of illegal aliens, the argument that the aliens' tax contribution outweighs the value of services consumed by them loses its validity.[81] New York City and Los Angeles estimate that they spend annually over one hundred million dollars each on public education for the children of illegal aliens.[82] Local governments that have no control over national immigration policies are also faced with providing medical care for millions of illegal aliens who are unable to participate in the MediCare provisions of the Social Security Act.[83]

B. Social and Political Impact

It has been alleged that the presence of this subculture of Mexican aliens is a threat to our social and political stability.[84] Areas with high population rates of illegal Mexicans reportedly have higher death and disease rates than those of the general population.[85] Illegal aliens may

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take affirmative measures to assure that social security numbers will be assigned to aliens whose status makes it lawful for them to work in the United States).

[80] *See* Note, *supra* note 16, at 294 (fact that aliens provide cheap labor is outweighed by costs to the rest of the taxpayers in the community).

[81] Income, cigarette, and liquor taxes and the major part of gas taxes go to the state and federal governments. This leaves only property and sales taxes to be collected by the counties. The illegal aliens' contribution to the property tax is usually negligible since most of them do not own homes. Thus, if county sales taxes are collected, they will represent the aliens' sole contribution to local tax revenues. *Hearings on S. 2252, supra* note 42 (May 16, 1978) (unpublished statement of Martin Carr at 7).

[82] *Hearings on S. 3074, supra* note 32, at 66 (statement of James L. Buckley).

[83] The problem of local governments' absorbing the costs of health services for undocumented aliens is national in scope as demonstrated by the following statistics: New York City, ten to twelve million dollars annually on illegal aliens, Chicago and Denver, same per capita rate as New York, Los Angeles County, fifty million dollars. A single hospital in Miami established that it spends $143,000 on illegal aliens each year. *Hearings on S. 2252, supra* note 42 (May16, 1978) (unpublished statement of Martin Carr at 5-8). *But cf.* Newsletter of the Intercultural Dev. Research Ass'n (Jan. 1978) (less than 5% of illegal aliens receive free medical attention), *cited in* American Friends Serv. Comm., *supra* note 33, at 5.

[84] *See generally* Salinas & Torres, *supra* note 6, at 881-84. *Contra* Nafziger, *supra* note 34, at 64 (views problem as myth).

[85] *See* United States v. Baca, 368 F. Supp. 398, 403 (S.D. Cal. 1973) (illegal aliens have "high incidence of typhoid, dysentery, tuberculosis, tapeworms, venereal disease and hepatitis" and often work as dishwashers or food handlers so as to create a potential health hazard); Salinas & Torres, *supra* note 6, at 882 (many aliens with high incidence of communicable disease work in restaurants); Note, *supra* note 16, at 290-91 (infant mortality and disease rate of Mexican population are threat to whole community).

also have an adverse impact on labor unionization and collective bargaining.[86] The charge that areas with a high concentration of illegal aliens also have higher crime rates has, however, been refuted.[87]

Attention has too often been focused on the costs to American citizens of supporting illegal aliens. The human costs and exploitation suffered by the aliens themselves must also be considered. The fact that the use of illegal alien labor encourages abusive labor practices is not disputed.[88] The government has, in effect, condoned this exploitation by failing to enact legislation to penalize employers of undocumented aliens. Continued exploitation could, however, backfire. The Secretary of Labor has warned that the children of these aliens may be the leaders of a national civil rights struggle within the next decade.[89]

IV. Weaknesses of Present Law

The major weaknesses of the present laws dealing with alien labor concern the interrelated areas of labor certification for legally admitted aliens and the methods of controlling the influx of illegal alien labor. While the labor certification requirements are intended to protect the American labor force, the difficulty of compliance with the requirements has actually tended to increase the number of illegal aliens competing in the American job market.[90] As previously noted, employment opportunity is one of the most significant "pull" factors drawing aliens northward.[91] Thus, an additional deficiency in the present laws' attempt to control illegal immigration is the failure to minimize job incentives by penalizing employers of illegal aliens.

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[86] *See* Note, *supra* note 1, at 466, 483 (commuters appear to have greater adverse impact than illegal aliens).

[87] Statistics available in the 1950's indicated that law enforcement problems rose with the number of illegal aliens. *See* Diaz v. Kay-Dix Ranch, 9 Cal. App. 3d 588, 596, 88 Cal. Rptr. 443, 448 (1970) (operation "wetback" resulted in drop in crime rate); Note, *supra* note 16, at 291 (reports indicate aliens' contribution to crime is substantial). This correlation between aliens and crime has been proven fallacious in more recent studies. Salinas & Torres, *supra* note 6, at 881.

[88] *See, e.g.*, Catz, *supra* note 1, at 754-55 (employers may deny they owe back wages to apprehended aliens); Nafziger, *supra* note 34, at 88 (even though wages paid are usually not substandard, they are below average, and employers can escape regulation of maximum hours, welfare obligations and job termination); Ortega, *supra* note 1, at 252 (unscrupulous employer may turn complaining alien over to the INS).

[89] *Hearings on S. 2252*, *supra* note 42 (May 11, 1978) (unpublished statement of Ray Marshall at 6-7).

[90] Griffith, *Deportation and the Alien—Some Aspects*, 25 Drake L. Rev. 329, 329 (1975).

[91] See note 50 and accompanying text *supra*.

A. *Labor Certification Requirements*

1. Statutory Framework

The statutory basis for alien labor certification is the Immigration and Nationality Act.[92] Before the 1965 amendment[93] to the INA, aliens were excluded from this country only if the Secretary of Labor certified that no labor shortage existed and that entry of the aliens would lower wages and cause poorer working conditions in the United States.[94] The 1965 amendment to the Act, however, requires exclusion of aliens unless the Secretary certifies that there is a shortage of workers who are "able, willing, qualified, and available," and that the employment of aliens will not adversely affect the wages and working conditions of similarly employed Americans.[95] Obviously, this amendment made it much more difficult for aliens to enter the American job market legally.[96] Because the typical alien worker will usually be unable to prove that there is a shortage of American workers in the country, he will be allowed to immigrate legally only by qualifying for an exemption from the certification requirement.[97] The 1976 amendment to the INA, however, further restricted the methods of legal entry by narrowing the class of aliens exempt from certification.[98]

2. Criticisms

Much of the criticism surrounding the certification procedures stems from the facts that the majority of applications for certification are denied without explanation, and that the Department of Labor con-

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[92] 8 U.S.C. § 1182(a)(14) (1976), provides in pertinent part:

> Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
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> . . . .
>
> (14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that (A) there are not sufficient workers who are able, willing, qualified . . . and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed.

[93] Act of Oct. 3, 1965, Pub. L. No. 89-236, §§ 10, 15, 79 Stat. 917, 919 (1965).

[94] *See* 8 U.S.C. § 1182(a)(14) (1964) (amended 1965).

[95] 8 U.S.C. § 1182(a)(14) (1976).

[96] Rodino, *The Impact of Immigration on the American Labor Market*, 27 RUTGERS L. REV. 245, 250 (1974).

[97] 14 SAN DIEGO L. REV. 326, 329 (1976).

[98] *See id.* at 329-30 (parents of minor children born in the United States no longer exempt under 8 U.S.C. §§ 1151(b), 1153(a)(5) (1976)).

centrates on the "availability" of American workers without considering whether these workers are able, willing, and qualified.[99] Consequently, most court decisions involving certification requirements involve a review of the denial of certification because of the "availability" of American workers.[100] The courts have stressed that reliance on generalized unemployment lists is insufficient to support rejection of a certification application without an additional showing that the unemployed American workers are willing, able and qualified.[101]

Pesikoff v. Secretary of Labor[102] placed the ultimate burden of proving unavailability of American workers on the alien or his potential employer rather than on the Department of Labor.[103] The court explained that the initial burden is on the Department of Labor to show availability.[104] The burden then shifts to the alien. To overcome the presumption of availability, the alien must show that the unemployed American labor is not willing, able, and qualified, and that the alien's own employment will not adversely affect wages and working conditions.[105]

Other courts have upheld certification denials where the Depart-

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[99] Gordon, *supra* note 23, at 13; Manulkin & Maghame, *supra* note 32, at 52-53.

[100] Rubin & Macini, *An Overview of the Labor Certification Requirement for Intending Immigrants*, 14 SAN DIEGO L. REV. 76, 93-94 (1976).

[101] *E.g.*, Ratnayake v. Mack, 499 F.2d 1207, 1213 (8th Cir. 1974) (no showing that available teachers were willing to teach in Montessori schools); Digilab, Inc. v. Secretary of Labor, 495 F.2d 323, 326 (1st Cir.) (no showing that available American electrical engineers were qualified), *cert. denied*, 419 U.S. 840 (1974); Bitang v. Regional Manpower Adm'r, 351 F. Supp. 1342, 1345 (N.D. Ill. 1972) (state employment service finding of availability is insufficient); Golabeck v. Regional Manpower Adm'r, 329 F. Supp. 892, 895 (E.D. Pa. 1971) (no showing that available teachers were interested in vacancy).

The denial of certification will also be reversed if the findings of availability or adverse effect on wages and working conditions do not refer to the particular place of requested employment. *See* Reddy, Inc. v. United States Dept. of Labor, 492 F.2d 538, 545 (5th Cir. 1974).

[102] 501 F.2d 757 (D.C. Cir.), *cert. denied*, 419 U.S. 1038 (1974).

[103] 501 F.2d at 761.

[104] *Id.* Many cases have approved the method of shifting the burden of proof used in *Pesikoff*. *See, e.g.*, Silva v. Secretary of Labor, 518 F.2d 301, 309-10 (1st Cir. 1975) (though burden of proof is ultimately on employer or alien, employer's preferences are not irrelevant); Yusuf v. Regional Manpower Adm'r, 390 F. Supp. 292, 295 (W.D. Va. 1975) (after general survey of labor market revealing available Americans, the burden shifts).

It remains unclear whether the Fifth Circuit follows the *Pesikoff* shifting-burden-of-proof test. In Reddy, Inc. v. United States Dept. of Labor, 492 F.2d 538 (5th Cir. 1974), the majority reversed a denial of certification that was based on insufficient evidence despite the fact that neither the alien nor his potential employer introduced any evidence. In his dissent, Judge Clark, noting that the burden of proof is on the employer and alien, stated that the "statute is not designed to fulfill a peculiar manpower requirement of a particular employer but is designed to benefit prospectively the national economy, cultural interests, or welfare of the United States." *Id.* at 546.

[105] 501 F.2d at 761.

ment of Labor's decision was not shown to be either arbitrary and capricious or an abuse of discretion.[106] Thus, the cases dealing with review of certification denials will continue to be inconsistent until specific guidelines are set forth explaining what quantum of proof is necessary to sustain both parties' burdens of proof.[107]

B. Control of Illegal Immigration by Reducing Employment Incentive

The most direct method of controlling illegal entries is intensification of the efforts of the Border Patrol.[108] Such efforts, however, have failed to decrease significantly the number of illegal aliens entering the American work force.[109] It seems also that the imposition of severe penalties on apprehended illegal aliens would substantially diminish the immigration incentive. Our immigration laws, however, which provide for both civil and criminal sanctions against apprehended aliens,[110] have little, if any, practical deterrent effect.[111] Thus, most authorities agree that the proper method of reducing illegal entries is to destroy the employer's incentive to hire the aliens rather than to impose more severe penalties on the aliens themselves.[112]

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[106] *E.g.*, Shuk Yee Chan v. Regional Manpower Adm'r, 521 F.2d 592, 594 (7th Cir. 1975); Secretary of Labor v. Farino, 490 F.2d 885, 889 (7th Cir. 1973). *See also* Rubin & Macini, *supra* note 100, at 103-04.

[107] *See* Note, *Alien Labor Certification*, 60 MINN. L. REV. 1034, 1055-58 (1976) (courts should require that the showing of "able, willing, qualified and available" workers be made through evidence of (1) unemployment, (2) cost of training, (3) employers' needs, and (4) labor mobility).

[108] *See* Catz, *supra* note 1, at 758; Fragomen, *Searching for Illegal Aliens: The Immigration Service Encounters the Fourth Amendment*, 13 SAN DIEGO L. REV. 82, 119 (1975).

[109] *Id.; see* United States v. Martinez-Fuerte, 428 U.S. 543, 552 (1976) (much of two thousand mile long border is uninhabited desert where entry can be made without detection despite Border Patrol surveillance), *noted in* 14 SAN DIEGO L. REV. 257 (1976); Diaz v. Kay-Dix Ranch, 9 Cal. App. 3d 588, 594, 88 Cal. Rptr. 443, 447 (1970) (despite fact that INS apprehends large numbers, many are not apprehended); Note, *supra* note 1, at 483-84 (use of visitor passes contributes to ineffectiveness of Border Patrol).

[110] 8 U.S.C. § 1251(a)(2) (1976) (formal deportation); *id.* § 1254(e) (INS may waive formal deportation and allow alien to leave the country voluntarily); *id.* § 1325 (fraudulent entry punishable by six months, $500 fine, or both for first offense and up to two years, $5000 fine or both for subsequent violation); *id.* § 1326 (subsequent apprehension after conviction or deportation punishable by two years, $1000 fine, or both).

[111] *See* Salinas & Torres, *supra* note 6, at 885 (most return repeatedly, not expecting to be jailed); Note, *supra* note 16, at 294 (lack of any practicable sanction against aliens).

[112] *E.g.*, Catz, *supra* note 1, at 758; Chapman, *supra* note 32, at 39. *But cf.* Gordon, *supra* note 23, at 33 (author unconvinced that employer sanctions are necessary or desirable); Nafziger, *supra* note 34, at 94-95 (criticizes legislation that penalizes knowing employment of illegal aliens).

1. Employment Exemption from Section 1324

In its present form, section 1324 of the INA[113] provides that the following acts shall be felonies: (1) bringing illegal aliens into the country, (2) knowingly transporting illegal aliens within the country, (3) knowingly concealing, harboring or shielding illegal aliens, and (4) knowingly encouraging or inducing illegal entry. The statute provides cumulative punishment for each alien involved.[114] The statute also contains the following proviso which is one of the most criticized[115] sections of the INA: "*Provided, however,* for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring."[116] Because of this proviso, employers can hire illegal workers with impunity. The incentive to hire illegal aliens therefore spawns the continued incentive for illegal immigration and inhibits the efforts of the INS.[117]

A person commits a felony under section 1324 if he "willfully or knowingly conceals, harbors, or shields from detection" an illegal alien.[118] Employment and its usual practices are exempt only from the meaning of "harbor."[119] Thus, the courts have had to distinguish "harbor" from "conceal" and "shield," and have had to determine whether an employer can ever be guilty of the latter two offenses.

Courts have uniformly held that knowledge of the alien's illegal status is necessary for conviction under section 1324.[120] Whether the mere provision of shelter with knowledge of the alien's illegal status was sufficient to constitute "harboring," however, remained uncertain until

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[113] 8 U.S.C. § 1324(a) (1976).

[114] *Id.; see* Vega-Murillo v. United States, 264 F.2d 240, 240 (9th Cir.) (conviction for transporting three aliens at same time, in same car, from same origin, to same destination), *cert. denied,* 360 U.S. 936 (1959); Jones v. United States, 260 F.2d 89, 90 (9th Cir. 1958) (because § 1324 provides cumulative punishment, appellant was not subjected to more than one punishment for the same crime); Sepulveda v. Squier, 192 F.2d 796, 798 (9th Cir. 1951) (same result under predecessor statute).

[115] *See, e.g.,* Catz, *supra* note 1, at 759 (threat of sanction needed); Greene, *supra* note 24, at 454 (consistent user of illegal aliens rarely prosecuted); Note, *supra* note 1, at 485 (failing to impose employer sanctions, "Congress must accept much of the blame for the illegal alien problem").

[116] 8 U.S.C. § 1324(a) (1976).

[117] Note, *supra* note 1, at 485.

[118] 8 U.S.C. § 1324(a) (1976).

[119] *Id.*

[120] *E.g.,* United States v. Rodriguez, 532 F.2d 834, 837 (2d Cir. 1976) (knowledge of status necessary); United States v. Lopez, 521 F.2d 437, 441 (2d Cir.) (knowledge of status necessary element of harboring), *cert. denied,* 423 U.S. 995 (1975); United States v. Peyton, 454 F.2d 213, 213 (9th Cir. 1971) (knowledge of status as element of transportation offense); *see* United States v. Mack, 112 F.2d 290, 291 (2d Cir. 1940) (predecessor statute required knowledge of status for harboring offense).

the recent case of *United States v. Lopez.*[121] In *Lopez* the defendant contended that, to constitute harboring, the conduct must be related to the smuggling process.[122] The court disagreed and held that providing shelter "in order to facilitate the continued unlawful presence . . . amounts to harboring."[123]

Nevertheless, it seems unfair to prosecute the good samaritan who merely allows an illegal alien to spend a night on his premises while exempting the employer who knowingly hires cheap, illegal alien labor. Yet the *Lopez* court found a rational basis for exempting employment and not exempting mere provision of shelter from section 1324.[124] This unfairness was noted in a more recent case which nevertheless upheld the *Lopez* definition of "harbor."[125]

The apparent injustice created by the employment exemption has, however, been mitigated by two cases decided in 1977.[126] Under the rule of *United States v. Cantu,*[127] if an employer exceeds the normal incidents of employment and violates other alienage laws in his conduct with the aliens, he may be guilty of "shielding or concealment," despite the exemption.[128] Similarly, in *United States v. Mount Fuji Japanese Steak House, Inc.,*[129] the court explained that employers are not exempt from harboring if, in addition to employment, the government can prove employer conduct that substantially facilitated the alien's illegal presence.[130]

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[121] 521 F.2d 437 (2d Cir.), *cert. denied,* 423 U.S. 995 (1975).

[122] 521 F.2d at 441. An earlier line of cases interpreting a predecessor statute of § 1324 held that "harbor" meant surreptitious concealment. United States v. Mack, 112 F.2d 290, 291 (2d Cir. 1940); Susnjar v. United States, 27 F.2d 223, 224 (6th Cir. 1928); *cf.* United States v. Evans, 333 U.S. 483, 488 (1948) (uncertainty if acts unconnected with smuggling process were prohibited).

[123] 521 F.2d at 441.

[124] *Id.* at 442 (employer may have lesser capacity to ascertain alienage than a landlord).

[125] United States v. Acosta de Evans, 531 F.2d 428, 430 (9th Cir.), *cert. denied,* 429 U.S. 836 (1976). The court made the following statement:

> There may be something unfair about the exemption of employment from harboring—many of the aliens enter this country in search of jobs; the statute allows those who exploit their labor to escape punishment while penalizing persons . . . acting in a neighborly and humane fashion—but it is the kind of unfairness . . . for Congress, not courts, to cure.

531 F.2d at 430.

[126] United States v. Cantu, 557 F.2d 1173 (5th Cir. 1977), *cert. denied,* 98 S. Ct. 1236 (1978); United States v. Mount Fuji Japanese Steak House, Inc., 435 F. Supp. 1194 (E.D.N.Y. 1977).

[127] 557 F.2d at 1173 (5th Cir. 1977), *cert. denied,* 98 S. Ct. 1236 (1978).

[128] 557 F.2d at 1177 (defendant convicted for shielding illegal alien employees of his restaurant after helping them pose as customers to escape arrest).

[129] 435 F. Supp. 1194 (E.D.N.Y. 1977).

[130] *Id.* at 1201.

The courts also have had to define the employment exemption in terms of its effect on the other crimes under section 1324: bringing in, transporting, and encouraging the entry of illegal aliens.

Defendants convicted of transporting and bringing aliens into the United States have challenged the employment exemption as a violation of equal protection and due process.[131] In these cases, however, the courts refused to address the constitutional issue because the exemption applies only to harboring.[132] But when the issue was reached in a harboring case, the court ruled, using the rational basis test, that there was no constitutional violation.[133]

The unfairness of punishing a man who knowingly gives an illegal alien shelter without punishing the alien's employer is obvious.[134] There is no doubt, however, that employers too are subject to penalties for knowingly transporting, bringing in, or encouraging entry of illegal aliens.[135] Thus, employers may be convicted for transporting[136] even if the sole purpose of the transportation is to move the alien to his place of legal employment.[137] The employer may also be convicted for conspiring to transport without having any personal involvement in the actual smuggling process.[138] The conviction does not depend on whether the employer has supplied his own means of conveyance,[139] nor does it matter that no overt acts of inducement took place within the United

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[131] United States v. Gonzalez-Hernandez, 534 F.2d 1353, 1354 (9th Cir. 1976); Herrera v. United States, 208 F.2d 215, 218 (9th Cir. 1953), *cert. denied*, 347 U.S. 927 (1954).

[132] United States v. Gonzalez-Hernandez, 534 F.2d 1353, 1354 (9th Cir. 1976); Herrera v. United States, 208 F.2d 215, 218 (9th Cir. 1953), *cert. denied*, 347 U.S. 927 (1954).

[133] United States v. Lopez, 521 F.2d 437, 441-42 (2d Cir.), *cert. denied*, 423 U.S. 995 (1975).

[134] *See* Herrera v. United States, 208 F.2d 215, 218 (9th Cir. 1953) (Pope, J., concurring) (doubts rationality of employment distinction), *cert. denied*, 347 U.S. 927 (1954). For a factual situation demonstrating the possible absurdity of the distinction, see United States v. Holly, 493 F.2d 581, 582 (9th Cir.) (taxi driver responding to call arrested for transporting illegal aliens), *cert. denied*, 419 U.S. 861 (1974).

[135] *See, e.g.*, United States v. Bunker, 532 F.2d 1262, 1264 (9th Cir. 1976) (employer convicted for bringing in aliens to work on his ranch).

[136] For the elements of the transportation offense, see United States v. Gonzalez-Hernandez, 534 F.2d 1353, 1354 (9th Cir. 1976); Banderas-Aguirre v. United States, 474 F.2d 985, 986 (5th Cir. 1973) (knowledge of status is necessary).

[137] United States v. Gonzalez-Hernandez, 534 F.2d 1353, 1354 (9th Cir. 1976).

[138] *See* United States v. Vega-Limon, 548 F.2d 1390, 1391 (9th Cir. 1977) (employer not personally involved).

[139] *See* United States v. Washington, 471 F.2d 402, 404-05 (5th Cir.) (transportation need not be by private vehicle under defendant's control), *cert. denied*, 412 U.S. 930 (1973); Carranza-Chaidez v. United States, 414 F.2d 503, 505 (9th Cir. 1969) (transportation need not be vehicular and encompasses provision of a guide). *But cf.* McFarland v. United States, 19 F.2d 805, 806 (6th Cir. 1927) ("aiding and accompanying" an alien across the border does not violate the language of the statute which makes it an offense to "bring into or land in United States" such an alien).

States.[140] The case of *United States v. Moreno*,[141] however, contains disturbing language which implies that an employer may escape the penalties for knowingly transporting an alien if the transportation is not "in furtherance of such violation of law."[142] Another possible loophole that may allow employers to transport aliens to the employer's operating location surfaced in *United States v. Orejel-Tejeda*.[143] According to *Orejel-Tejeda* an employer may with impunity transport aliens who have entered legally but have overstayed their visas or moved into disallowed areas.[144]

Perhaps no group has been more acutely aware of the unfairness of the employment exemption than domestic workers who have been deprived of jobs because of the aliens' willingness to work for lower wages and the employers' protection in hiring them.[145] Both federal[146] and state courts[147] have refused, however, to imply a private right of action when domestic workers have sought to enjoin an employer's use of illegal labor.[148] State courts, while noting the inadequacies of present law,[149] have held that only the federal courts may imply a civil remedy for violation of section 1324.[150] By tagging the issue as political, the federal courts have likewise avoided the chance to expose employers to private actions.[151] Furthermore, the domestic farmworkers' attempt to enjoin

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[140] *See* United States v. Castillo-Felix, 539 F.2d 9, 12-13 (9th Cir. 1976) (acts of inducement took place in Mexico).

[141] 561 F.2d 1321 (9th Cir. 1977).

[142] *Id.* at 1322. In *Moreno* the defendant was a foreman who was required in the ordinary course of his business to transport illegal aliens from one site to another. His conviction was reversed because the court found no direct relationship between the transportation and the furtherance of the alien's illegal presence. *Id.* at 1323.

[143] 194 F. Supp. 140 (N.D. Cal. 1961).

[144] *Id.* at 144.

[145] The following statement was made in Diaz v. Kay-Dix Ranch, 9 Cal. App. 3d 588, 599, 88 Cal. Rptr. 443, 451 (1970): "Weighed alone on any scale of human values, the [domestic] farmworkers' need is vastly more acute than the prospective predicament of injunction-saddled employers."

[146] *See, e.g.*, Lopez v. Arrowhead Ranches, 523 F.2d 924, 926 (9th Cir. 1975); Flores v. George Braun Packing Co., 482 F.2d 279, 280 (5th Cir. 1973); Chavez v. Freshpict Foods, Inc., 456 F.2d 890, 892 (10th Cir.), *cert. denied*, 409 U.S. 1042 (1972).

[147] *See, e.g.*, Larez v. Orberti, 23 Cal. App. 3d 217, 224, 100 Cal. Rptr. 57, 61 (1972); Cobos v. Mello-Dy Ranch, 20 Cal. App. 3d 947, 950, 98 Cal. Rptr. 131, 133 (1971); Diaz v. Kay-Dix Ranch, 9 Cal. App. 3d 588, 599, 88 Cal. Rptr. 443, 451 (1970).

[148] *See generally* Note, *Implied Federal Rights of Action and the Migrant Farmworker*, 44 U. COLO. L. REV. 237 (1973) (tort per se analysis would allow federal courts to imply remedy for farmworkers in certain circumstances).

[149] *See, e.g.*, Diaz v. Kay-Dix Ranch, 9 Cal. App. 3d 588, 599, 88 Cal. Rptr. 443, 451 (1970) ("national government has breached the commitment implied by national immigration policy").

[150] *E.g.*, Larez v. Orberti, 23 Cal. App. 3d 217, 224, 100 Cal. Rptr. 57, 61 (1972).

[151] *E.g.*, Chavez v. Freshpict Foods, Inc., 456 F.2d 890, 893-94 (10th Cir.), *cert. denied*, 409 U.S. 1042 (1972).

employers under the Civil Rights Act from hiring illegal aliens has also been denied.[152]

2. Farm Labor Contractor Registration Act

Although Congress has failed to remove the employment exemption from section 1324, legislation has been enacted in related areas.[153] Presently, the only law that regulates the mere employment of illegal aliens is the Farm Labor Contractor Registration Act of 1963 (FLCRA).[154] The Act provides that the Secretary of Labor may suspend, revoke, or refuse to renew a farm labor contractor's certificate of registration if he knowingly employs or recruits an illegal alien.[155] Criminal penalties are also imposed on contractors who knowingly violate the Act.[156] Unlike section 1324 of the INA, the FLCRA provides civil penalties to give employees a private right of action against contractors who hire illegal aliens.[157]

The coverage of the FLCRA, however, is too limited to have any substantial effect on the employment of undocumented aliens.[158] The Act only applies to farm labor while aliens are employed in varied fields of endeavor.[159] Moreover, the term "farm labor contractor" is defined by the Act so that any *"farmer,* processor, canner, ginner, packing shed operator or nurseryman" who recruits solely for the purpose of supplying workers for his own operation is excluded from the Act's sanctions.[160]

V. Legislative Attempts to Curb Illegal Immigration

A. State Legislative Attempts

The power to regulate immigration rests exclusively in the federal government.[161] Yet the federal government has repeatedly failed to enact

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[152] *See* Lopez v. Arrowhead Ranches, 523 F.2d 924, 927-28 (9th Cir. 1975) (alleged discrimination in favor of illegal workers does not give rise to a § 1985(3) claim).

[153] Salinas & Torres, *supra* note 6, at 901 n.328 (citing the Farm Labor Contractor Registration Act, 7 U.S.C. § 2044(b)(6) (1976), and the Social Security Act, 42 U.S.C. § 405 (1976)).

[154] 7 U.S.C. §§ 2041-2053 (1976).

[155] *Id.* § 2044(b)(6).

[156] *Id.* § 2048. A wilful violation may carry a fine of up to but not over $10,000, or a prison term not to exceed three years, or both. *Id.* § 2048(c).

[157] *Id.* § 2050a(a). *See* Guerrero v. Garza, 418 F. Supp. 182, 184 (W.D. Wis. 1976) (migrant farmworkers bringing a class action); *cf.* Salinas v. Amalgamated Sugar Co., 341 F. Supp. 311, 316 (D. Idaho 1972) (private right of action denied where defendant was not a farm labor contractor).

[158] Catz, *supra* note 1, at 760.

[159] See note 58 and accompanying text *supra.*

[160] 7 U.S.C. § 2042(b)(2) (emphasis added).

[161] *E.g.,* Hines v. Davidowitz, 312 U.S. 52, 62-63 (1941); Chy Lung v. Freeman, 92 U.S. 275 (1876).

legislation to penalize employers for knowingly employing illegal aliens.[162]

1. Preemption

As early as 1954 one legal writer suggested that the INA does not preempt the states from imposing, through their police power, criminal sanctions against employers of illegal aliens.[163] But the power of states to diminish the adverse impact of illegal aliens was jeopardized by language in *Hines v. Davidowitz,*[164] which preempted a state alien registration act in light of Congressional legislation on the same subject.[165] All questions of preemption, however, were answered in *De Canas v. Bica,*[166] where the Supreme Court upheld a California statute prohibiting knowing employment of illegal aliens when the employment has an adverse effect on domestic workers.[167] The *De Canas* Court noted that there was no Congressional intention to preclude state law in the area of employment regulations and that *Hines* was distinguishable because it was concerned with a *specific field* controlled by federal statutes which were infringed upon by state regulations.[168]

2. Disadvantages in State Legislation

At least thirteen states and a number of cities have now passed statutes to penalize employers who hire illegal aliens.[169] Because the

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[162] See notes 174 through 191 and accompanying text *infra.*

[163] *See* Note, *supra* note 16, at 316. The author argued that the fourteenth amendment due process requirements would be met since state action would bear a legitimate legislative purpose and would be a reasonably adapted means for achieving the end result. *Id.*

[164] 312 U.S. 52 (1941). In holding a Pennsylvania Alien Registration Act preempted, the Court stated that "this legislation is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority." *Id.* at 68.

[165] Decided on the basis of a conflict in federal and state laws, *Hines* left open the possibility that state alien laws not in conflict with federal laws may be permissible. *Id.* at 68 n.23.

[166] 424 U.S. 351 (1976), *noted in* 14 SAN DIEGO L. REV. 282 (1976); 12 TEX. INT'L L.J. 87 (1977).

[167] *See* Cal. Lab. Code § 2805(a) (West 1976). The statute had been previously challenged in Delores Canning Co. v. Howard, 40 Cal. App. 3d 673, 115 Cal. Rptr. 435 (1974), where it was decided that Congress had preempted the field. *Id.* at 686, 115 Cal. Rptr. at 442. *See generally* Comment, *State Regulation of the Employment of Illegal Aliens: A Constitutional Approach,* 46 S. CAL. L. REV. 565 (1973) (proposed rewrite of § 2805 to withstand the *Delores Canning* rationale).

[168] 424 U.S. at 362-63. The Court also noted that *Hines* applied to an imposition on aliens lawfully within the country whereas *De Canas* was concerned with aliens unlawfully within the country. *Id.*

[169] *Hearings on S. 2252, supra* note 42 (May 10, 1978) (unpublished statement of Warren Christopher at 11).

problem of illegal immigration is national in scope, the disadvantages of nonuniform action are readily apparent.[170] Some of the noted disadvantages in allowing states to control immigration by penalizing employers include the following: (1) state personnel are not as experienced as the INS, (2) state laws cannot contain amnesty provisions, (3) state laws are more likely to be discriminatory, and (4) states tend to show less concern for due process rights.[171] Thus, it has been strongly urged that Congress nullify the *De Canas* holding by enacting legislation restricting the employment of illegal aliens.[172] Pending legislation in the Senate[173] will, if enacted, accomplish this goal.

B. Federal Legislative Attempts

Attempts were made as early as 1952 to impose federal penalties on employers for hiring illegal aliens.[174] This proposed legislation was defeated by a coalition of farm block and conservative senators,[175] with both Senator Stennis[176] and Senator Eastland[177] voicing disapproval of the proposed law. Thus, when the INA was passed in 1952 there was no provision for penalizing employers.

1. Unenacted Bills Providing Employer Sanctions

There has been in the last decade a renewed effort to control illegal immigration from Mexico. Hearings initiated by the House Judiciary Subcommittee on Immigration resulted in the introduction by Con-

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[170] *See id.* ("[L]ocal activities can greatly complicate our foreign relations and undermine the international image of the United States"); *Hearings on S. 3074, supra* note 32, at 103 (multistate corporations should not have to be subjected to conflicting state laws with possible criminal sanctions) (statement of Stanley Mailman).

[171] 12 TEX. INT'L L.J. 87, 95 (1977).

[172] Salinas & Torres, *supra* note 6, at 900.

[173] S. 2252, 95th Cong., 1st Sess. § 5(a)(3) (1977), provides that "provisions of this section are intended to preempt any State or local laws imposing . . . sanctions upon those who employ, or facilitate the employment, of [illegal aliens]."

[174] *See* 98 CONG. REC. 802-13 (1952). Senator Douglas proposed a penalty of a one year imprisonment or a $2,000 fine or both for the hiring of each known illegal alien. *Id.* at 803.

[175] *See* Salinas & Torres, *supra* note 6, at 874.

[176] Senator Stennis made the following remarks:

> These laborers from Mexico are used for only a few weeks, during the peak of the cotton-picking season. My state is approximately a thousand miles from the Mexican border. There is considerable competition for those workers . . . .
>
> [The proposed law would place] an unreasonable burden upon the employer . . . .

98 CONG. REC. 808 (1952).

[177] Senator Eastland admitted the farmer usually knows when the labor is illegal, but because many farms are "founded to a considerable extent upon Mexican . . . labor," the amendment is unfair to both the farmer and the alien. *Id.* at 812.

gressman Rodino of H.R. 16188, which would have provided penalties for the knowing employment of illegal aliens.[178] The bill was never debated by the Senate nor considered by the Senate Judiciary Committee.[179] The following year Rodino reintroduced his bill as H.R. 982.[180] The proposed penalties for violation included a citation from the Attorney General for a first offender, a $500 fine for the second violation within two years of the previous citation, and a $1000 fine or one year's imprisonment or both for each alien employed in any additional violation.[181] Once again the Senate failed to act on the bill.[182] Rodino stubbornly introduced a similar bill[183] again in 1975, and again, it died in the Senate.[184]

Bills prohibiting the employment of illegal aliens have also been introduced in the Senate. Senator Kennedy introduced such a bill in 1974.[185] Kennedy's bill, S. 561, differed from the Rodino bill in several respects. The Kennedy bill provided for strict civil penalties, but no criminal sanctions were provided. Under this bill, the employer need not have had knowledge of the employee's status, and an employer could have prevented all liability by making a "bona fide inquiry" into the alien's status and obtaining a signed statement from the alien indicating that he was a legal resident.[186]

In 1976, Senator Eastland, who had opposed similar legislation many years before,[187] introduced his own bill to punish employers who knowingly hire illegal aliens.[188] Eastland's bill differed from earlier legislation by providing for the immediate imposition of civil penalties without a citation for a first offense.[189] To ensure fairness, the bill provided for full scale administrative hearings and judicial review.[190] The Eastland bill was similar to the Kennedy bill, however, in that an employer could not be found guilty under the bill if he made a "bona fide inquiry" concerning the alien's status.[191]

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[178] Salinas & Torres, *supra* note 6, at 901.

[179] *Id.*; Manulkin & Maghame, *supra* note 32, at 55.

[180] H.R. 982, 93d Cong., 1st Sess. (1973).

[181] *Id.*; Catz, *supra* note 1, at 761; Manulkin & Maghame, *supra* note 32, at 56.

[182] *See* Salinas & Torres, *supra* note 6, at 902.

[183] H.R. 8713, 94th Cong., 1st Sess. § 2 (1975) (penalties same as in H.R. 982).

[184] *See* Catz, *supra* note 1, at 760.

[185] S. 3827, 93d Cong., 2d Sess. (1974) (resubmitted as S. 561, 94th Cong., 1st Sess. (1975)).

[186] S. 3827, *supra* note 185. For a discussion of various sections of this bill, see Catz, *supra* note 1, at 761; Salinas & Torres, *supra* note 6, at 905.

[187] See note 177 and accompanying text *supra*.

[188] S. 3074, 94th Cong., 2d Sess. (1976).

[189] *Id.* ($500 as to each alien on the first offense and up to $1000 for subsequent offenses). *See also* Catz, *supra* note 1, at 762.

[190] S. 3074, 94th Cong., 2d Sess. (1976).

[191] *Id.* (evidence that the employer obtained a written statement from the alien would

2. Pending Legislation

With the legislature's seeming inability to agree on the content of a bill, President Carter, in a Presidential message on August 4, 1977, outlined proposals to help reduce the migration of illegal aliens to this country.[192] Carter proposed that the hiring of illegal aliens be made unlawful, with enforcement against employers who engage in a "pattern or practice" of such hiring. The penalties under Carter's proposal consist of injunctions and fines, with criminal penalties imposed only on employers who either violate injunctions or receive compensation for assisting aliens in obtaining employment.[193]

On October 28, 1977, Senator Eastland introduced S. 2252, which incorporates the President's proposal.[194] Following the President's suggestion, the bill creates a rebuttable presumption that the employer has not violated the law if he can prove that before the hiring he saw documentary evidence of the alien's eligibility to work.[195] Eastland's bill also clearly indicates an intent to preempt any state or local laws imposing sanctions on employers of illegal aliens.[196]

VI. Analysis of Pending Legislation

Although the need for some type of penalty to restrict the employment of illegal aliens has long been recognized,[197] the content of such legislation continues to be a matter of dispute. Thus, a critical analysis of the content of S. 2252 is appropriate.[198]

A. Short Range Solution

While S. 2252 provides a partial solution to the "pull factor" of employment, the bill has been criticized for failing to propose long-term

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be deemed prima facie proof of a good faith inquiry). For a discussion of this legislation, see 14 San Diego L. Rev. 301, 304-05 (1976).

[192] President's Message to Congress Proposing Actions to Reduce the Flow of Undocumented Aliens (August 4, 1977), *reprinted in* 134 Cong. Rec. S13826 (daily ed. Aug. 4, 1977) [hereinafter cited as *President's Message*].

[193] *President's Message*, *supra* note 192, at 1171 (maximum civil fine of $1000 and criminal penalties not aimed at employment agencies or union halls inadvertently referring illegal aliens to jobs).

[194] S. 2252, 95th Cong., 1st Sess. § 5 (1977).

[195] *Id.* § 5(a)(1)(5).

[196] *Id.* § 5(a)(3)(e). To complement and reinforce the criminal provisions of S. 2252, see note 193 and accompanying text *supra,* Senator Huddleston introduced a bill on May 17, 1978, providing for the seizure of vehicles used to transport illegal aliens. *See* S. 3093, 95th Cong., 2d Sess. (1978).

[197] See note 174 and accompanying text *supra.*

[198] Because the focus of this paper is on employment, the provision for adjustment of permanent and temporary resident status is not discussed. *See* S. 2252, 95th Cong., 1st Sess. § 4 (1977).

solutions to the problem of illegal Mexican immigration.[199] Legal writers have warned that there will be no lasting solution until the United States begins to assist and finance the economic development of Mexico.[200] In discussing the short-range effect of S. 2252, Attorney General Griffin Bell explained that the legislation "should not be considered in isolation, but as part of a larger plan which includes several initiatives that do not require new legislation."[201] These programs include steps taken by the Department of State to render economic assistance to Mexico, modernization of the INS, and reinforced border control and antismuggling efforts.[202]

B. Pattern or Practice Enforcement

Under S. 2252 the Attorney General shall not institute actions unless he has cause to believe that an "employer has engaged in a pattern or practice of employing aliens in violation of this subsection."[203] The bill does not, however, define "pattern or practice." The Attorney General sought to dispel any apprehensions of the Senate Judiciary Committee concerning the ambiguity of the phrase by stating that the "Department of Justice has had excellent success in its pattern or practice litigation"[204] as it is presently used in other statutes.[205]

Surprisingly, the courts have given "pattern or practice" the same interpretation where different statutes were involved. For example, in *Teamsters v. United States,*[206] the Court held that in a Title VII employ-

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[199] *E.g., Hearings on S. 2252, supra* note 42 (May, 1978) (S. 2252 "does little more than verbalize any long-term solutions designed to solve the 'push' factors") (unpublished statement of Sen. Harrison Schmitt at 9); Chapman, *supra* note 32, at 40 (sanctions provide immediate short-term solution only).

[200] Nafziger, *supra* note 34, at 105; Salinas & Torres, *supra* note 6, at 915-16; *see* Note, *supra* note 16, at 288-90 (aliens will accept substandard pay and working conditions since conditions are even worse in the alien's native land); *President's Message, supra* note 192, at 1173 (aliens will continue to ignore barriers until a strong economy is developed in their own country).

[201] *Hearings on S. 2252, supra* note 42 (May 10, 1978) (unpublished statement of Griffin B. Bell at 2).

[202] *Id.* at 2-3. Legislative aid for the antismuggling effort is in a separate pending bill. *See* S. 3093, 95th Cong., 2d Sess. (1978). See note 196 *supra.*

[203] S. 2252, 95th Cong., 1st Sess. § 5(a)(1)(4) (1977).

[204] *Hearings on S. 2252, supra* note 42 (May 10, 1978) (unpublished statement of Griffin B. Bell at 5).

[205] Statutes in the area of civil rights often allow the Attorney General to sue when there has been a "pattern or practice" of statutory violations. *See* 42 U.S.C. §§ 2000a-5, 2000e-6(a), 3613 (1976) (Attorney General may bring civil action where he has reasonable cause to believe persons are engaged in a pattern or practice of resistance to enjoyment of civil rights).

[206] 431 U.S. 324 (1977).

ment discrimination case[207] the government must show "more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts. It had to establish . . . that racial discrimination was . . . the regular rather than the unusual practice."[208] An earlier Title VII case had stressed that while the Attorney General may rely on statistics in inferring a pattern or practice, there is no mathematical test that can be applied to all cases.[209] Similarly, in *United States v. West Peachtree Tenth Corp.*,[210] the court held that "pattern or practice" under the Fair Housing Act of 1963[211] required more than an "isolated or accidental or peculiar event" and that "no mathematical formula is workable, nor was any intended."[212] Thus, it appears that the issue of whether an employer has engaged in a pattern or practice under S. 2252 will be litigated on a case-by-case basis.

C. No Criminal Penalties

The employer who engages in a pattern or practice of hiring illegal aliens may, under S. 2252, be enjoined from his employment practices and fined up to $1000.[213] An employer who is not involved in the smuggling process will not therefore be subject to imprisonment unless he is held in contempt for violation of an injunction against continued employment of aliens.[214]

Some commentators,[215] as well as earlier proposed legislation,[216] had advocated use of criminal sanctions against employers of illegal aliens. However, the Attorney General disagreed, arguing that criminal sanctions are less likely to be enforced and would result in lengthy, expensive

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[207] This case arose under 42 U.S.C. § 2000e (1976).

[208] Teamsters v. United States, 431 U.S. 324, 336 (1977); *see* United States v. Ironworkers Local 86, 443 F.2d 544, 552 (9th Cir.) (court not concerned with isolated or accidental acts), *cert. denied*, 404 U.S. 984 (1971).

[209] United States v. Jacksonville Terminal Co., 451 F.2d. 418, 441-42 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972).

[210] 437 F.2d 221 (5th Cir. 1971).

[211] 42 U.S.C. § 3613 (1976).

[212] 437 F.2d at 227; United States v. Northside Realty Associates, Inc., 474 F.2d 1164, 1169 (5th Cir. 1973) (quoting *West Peachtree* and finding one violation insufficient for pattern or practice); United States v. Bob Lawrence Realty, Inc., 474 F.2d 115, 123-24 (5th Cir.) (quoting *West Peachtree*), *cert. denied*, 414 U.S. 826 (1973).

[213] S. 2252, 95th Cong., 1st Sess. § 5(a)(1) (1977) ($1000 for each alien).

[214] *See President's Message, supra* note 192 (potential criminal contempt citation for violation of injunction).

[215] *See, e.g., Hearings on S. 2252, supra* note 42 (May 17, 1978) (civil penalties on employers and criminal penalties if employer engages in pattern or practice) (unpublished statement of Ronald H. Brown at 9).

[216] *E.g.*, H.R. 8713, 94th Cong., 1st Sess. (1975) (employer would receive a citation for the first violation, a civil penalty for the second violation, and a criminal penalty for the third violation).

court cases.[217] He also stated that S. 2252 avoids the administrative problem of issuing citations, which normally precedes the imposition of criminal penalties.[218]

D. Employer's Safeguard of Obtaining Documentary Evidence

One of the criticisms of earlier legislation similar to S. 2252 was that these earlier bills[219] unnecessarily provided employers with a statutory defense[220] by allowing them "to rely on self-serving statements by prospective employees."[221] Under S. 2252, however, the employer must prove that, prior to the employment, he saw such documentary evidence of the alien's legal status as may be designated by future Attorney General regulations.[222]

The most common objections to this provision are that it could lead to an increased use and trade in forged documents,[223] and that it could be the first step toward implementation of a national identification card.[224] The Attorney General has indicated that valid documentation would include a social security card, birth certificate, or alien registration card.[225]

The problem of forgery has been greatly alleviated by the recently implemented procedures for issuance of social security cards.[226] While the administration has sought to diminish fears of potential violations of privacy that could accompany the transformation of the social security card into a national identification card,[227] the government may find

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[217] *Hearings on S. 2252, supra* note 42 (May 10, 1978) (unpublished statement of Griffin B. Bell at 8).

[218] *Id.*

[219] S. 3074, 94th Cong., 2d Sess. (1976); S. 561, 94th Cong., 1st Sess. (1975).

[220] S. 3074, 94th Cong., 2d Sess. (1976), would have protected employers who obtained a signed statement of the alien's legal status. The Commissioner of the INS stated that "it is neither necessary or desirable to provide a statutory defense." *Hearings on S. 3074, supra* note 32, at 25 (statement of Leonard F. Chapman, Jr.).

[221] *Hearings on S. 3074, supra* note 32, at 150 (statement of Kenneth Meiklejohn).

[222] S. 2252, 95th Cong., 1st Sess. (1977). See note 225 and accompanying text *infra.*

[223] *See, e.g., Hearings on S. 2252, supra* note 42 (May 11, 1978) (problem of forgery is difficult but not insoluble) (unpublished statement of Ray Marshall at 8).

[224] President Carter tried to alleviate such fears by explaining that "no steps would be taken to make the Social Security or any other card, a national identification document." *President's Message, supra* note 192, at S13827.

On the other hand the Commissioner of the INS testified that "[i]f the Social Security card were counterfeit-proof, imposter-proof, machine-readable sort of thing . . . that is close to a national identity card, which I cannot advocate." *Hearings on S. 3074, supra* note 32, at 33 (statement of Leonard F. Chapman, Jr.).

[225] *Hearings on S. 2252, supra* note 42 (May 10, 1978) (unpublished statement of Griffin B. Bell at 7).

[226] See note 79 and accompanying text *supra.*

[227] *See Hearings on S. 2252, supra* note 42 (May 10, 1978) (social security card would

this spectre less threatening than the consequences of the continued influx of illegal aliens.

E. Discrimination

The primary objection to employer sanctions revolves around the possible discriminatory effect such legislation may have on legal aliens and people of Spanish descent.[228] Following the Supreme Court decision in *Espinoza v. Farah Manufacturing Co.*,[229] employers may discriminate against legal aliens authorized to work in this country without violating Title VII.[230] Eastland's bill contains no employment discrimination remedy to counteract the *Espinoza* rule.

Critics maintain that employer sanctions encourage employers not to hire "people who look or sound foreign or who have Spanish names."[231] These civil rights objections, however, had more validity under the earlier bills,[232] which placed the principal responsibility for determining an alien's status on the employer without providing a reliable method for making that determination.[233]

S. 2252 provides for a nondiscriminatory identification process. Critics still fear, however, that identification will be requested only from people of Spanish descent, thus making it more difficult for Spanish aliens and Spanish Americans to get jobs.[234] The Administration is

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not be a national identification card) (unpublished statement of Griffin B. Bell at 6); *id.* (May 11, 1978) (unpublished statement of Ray Marshall at 11).

[228] *See generally* Salinas & Torres, *supra* note 6, at 910.

[229] 414 U.S. 86 (1973).

[230] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000-2(a)(1) (1976), prohibits employment discrimination on the basis of "race, color . . . or national origin." *Espinoza* held that national origin does not encompass alienage or citizenship, but explained that aliens are protected from discrimination based on national origin if not based on citizenship. 414 U.S. at 95-96.

For discussions of employment discrimination against aliens, *see generally* Brousseau, *Alienage and the Constitution: The Requirement of State Action Under 1981*, 30 ARK. L. REV. 1 (1976); Das, *Discrimination in Employment Against Aliens—The Impact of the Constitution and the Federal Civil Rights Laws*, 35 U. PITT. L. REV. 536 (1974); Greenfield & Kates, *Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 CAL. L. REV. 662 (1975); Comment, *Labor Law Tools to Remedy Alien Employment Discrimination*, 24 CATH. U.L. REV. 509 (1975); Comment, *State Discrimination Against Mexican Aliens*, 38 GEO. WASH. L. REV. 1901 (1970); Comment, *The Constitutional Status of State and Federal Discrimination Against Resident Aliens*, 16 HARV. INT'L L.J. 113 (1975).

[231] Materials Concerning Immigration Proposals, *supra* note 33.

[232] *See, e.g.*, S. 3074, 94th Cong., 2d Sess. (1976).

[233] *See* Salinas & Torres, *supra* note 6, at 910 (discussing discriminatory effects of H.R. 982, S. 561 and S. 3074).

[234] *Hearings on S. 2252, supra* note 42 (May, 1978) (unpublished statement of Sen. Harrison Schmitt at 6); Materials Concerning Immigration Proposals, *supra* note 33.

aware of the possibility of increased discrimination.[235] The Attorney General has explained that the reliance on identification documents to be prescribed by regulation should prevent such discrimination.[236] Furthermore, President Carter contends that the use of civil penalties and enforcement only against employers who have engaged in a pattern or practice of illegal employment would "minimize any cause for discrimination."[237]

Conclusion

The stage has been set for a drama in which the struggle is not between evil and good, but between conflicting perceptions of what is right. In considering the short-term solution of employer sanctions as a method of curbing illegal entry into this country, the legitimate business needs of the employer must not be overlooked. Congress and the courts must continue to balance the needs of American labor against the needs of employers. As employers lose their ability to hire illegal aliens, the certification procedures should be enforced in such a way that employers will be able to hire aliens when there are no willing, able, qualified and available Americans to do the work. If this proposal is followed, the potentially tragic climax, though not avoided, may be postponed.

Margaret Alice Hegman

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[235] *See President's Message, supra* note 192, at 9 (sanctions are designed to minimize discrimination against Mexicans, and greater efforts will be made to enforce present antidiscrimination laws).

[236] *Hearings on S. 2252, supra* note 42 (May 10, 1978) (unpublished statement of Griffin B. Bell at 6-7).

[237] *President's Message, supra* note 192, at S13827.

TITLE SEARCHES: THE POTENTIAL FOR LIABILITY

The potential for liability in title searches creates a serious dilemma for attorneys. On one hand, the examination of title[1] can require a great investment of professional talent and time,[2] and in many instances the property's value does not warrant the investment to ensure against loss. On the other hand, the attorney who does not invest sufficient time and effort runs the risk of incurring liability far in excess of his compensation for the title search.[3] Since the client orders a title search to protect himself from loss,[4] the attorney becomes the logical choice to assume the loss[5] should that protection fail. Additionally, the interests of the client

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[1] Title searches involve the examination of public records pertaining to title to real property. Systems of recording title developed in the early American colonies and have continued to evolve as new methods of keeping records have developed. *See generally* 4 AMERICAN LAW OF PROPERTY §§ 17, 18 (A.J. Casner ed. 1974); Cribbett, *The Lawyer's Role, The Lawyer and Title Insurance,* 1 REAL PROP., PROB. AND TR. J. 355 (1966); Johnson, *Examining the Abstract of Title,* 46 N.D.L. REV. 175 (1970); Symposium, *Modernization of Land Data Systems,* 10 REAL PROP., PROB. AND TR. J. 593 (1975).

In conjunction with this comment, a survey was sent to selected attorneys in Mississippi. It asked questions about specific practices and duties in the performance of title searches. Although the selection of attorneys foreclosed any possibility of statistical significance, their responses illustrate a variety of opinions on matters of importance to title searchers. References to the survey throughout this comment will be cited as SURVEY, and copies are on file with the *Mississippi Law Journal.*

[2] An effort to produce perfect title goes beyond the needs of some clients. Blair, *The Client's Viewpoint, The Lawyer and Title Insurance,* 1 REAL PROP., PROB. AND TR. J. 355, 361 (1966); *see* 4 AMERICAN LAW OF PROPERTY § 18, at 652 (A.J. Casner ed. 1974) (examination must identify all interests in property and ascertain their priorities).

[3] *See, e.g.,* Gleason v. Title Guarantee Co., 300 F.2d 813, 815 (1962) (superior liens worth $83,979), *rehearing denied with opinion,* 317 F.2d 56 (5th Cir. 1963).

[4] Fay v. McGuire, 20 A.D. 569, 47 N.Y.S. 286, 287 (1897), *aff'd per curiam,* 57 N.E. 1109 (1900).

Title insurers may deal with the risk of loss more efficiently than title examiners. While an examiner may have to expend a great amount of time defining a risk through discovery of the records, an insurer can in many instances cover the risk more economically through insurance. Schmidt, *The Commercial Title Company, The Lawyer and Title Insurance,* 1 REAL PROP., PROB. AND TR. J. 355, 358 (1966). The attorney must define the risk in order to permit his client to decide whether or not to assume the risks of taking title. *See* Gilman v. Hovey & Buchanan, 26 Mo. 280, 290 (1858) (client must choose to accept risks of taking title).

[5] Damages are to be computed according to the difference in the value of the title acquired and the value of the title reported by the title searcher, *e.g.,* Gleason v. Title Guarantee Co., 300 F.2d 813, 815 (1962) (refusing to force attorney to purchase property), *rehearing denied with opinion,* 317 F.2d 56 (5th Cir. 1963). Recovery is possible for consequential damages that cannot be reasonably avoided. Trimboli v. Kinkel, 226 N.Y. 147, 123 N.E. 205, 206-07 (1919) (denying damages for unnecessary law suit). In any event, the client is entitled to nominal damages immediately upon receipt of a false title report. Lilly v. Boyd, 72 Ga. 83, 84 (1883). The attorney on the other hand may recover against the grantor on a theory of unjust enrichment, if the grantor has breached his warranty. *See* Zurich Gen. Accident & Liab. Ins. Co. v. Klein, 181 Pa. Super. 48, 121 A. 2d 893, 894-95

and the attorney will sometimes clash over the technical perfection to be demanded in the examination of title. Whereas the client may want only an estimate of the risk he would incur by taking title,[6] the cautious attorney appreciates the potential for error in a title search and eschews estimation in favor of detailed analysis. The attorney attempts to protect his own interests by providing the client with a thorough and accurate title search, but the client may often press for a speedy determination of title. Regardless of such pressures, the attorney must perform a professionally adequate title search.[7]

The "professionally adequate" standard depends to a great degree on what is reasonable under a given set of circumstances. The courts have not yet provided any panacea to remedy every problem faced by title searchers, but they have given some specific guidelines to deal with particular problems. A healthy respect for the potential for liability[8] requires that the title examiner familiarize himself with these guidelines and adapt them to his practice.[9]

Attorney liability in title searches develops through a breach of duty in two basic areas: the employment contract[10] and the standards of conduct imposed by the legal profession.[11] Thus, liability may be predicated on a contract theory or a tort theory.[12] Nevertheless, the stan-

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(1956) (allowing indemnification to attorney's insurer). The attorney is also entitled to an offset in the amount of any settlement between the grantor and the client. Katzenberger v. Bryan, 206 Va. 78, 85-86, 141 S.E.2d 671, 676-77 (1965) (partial settlement of claim does not preclude action against attorney for rest of amount lost due to breach of duty).

[6] *See* Blair, *supra* note 2, at 360-62 (discussing advantages of insurers in dealing with risk of loss).

[7] *See* Gleason v. Title Guarantee Co., 300 F.2d 813, 814 (1962), *rehearing denied with opinion*, 317 F.2d 56, 60 (5th Cir. 1963) (custom could not alter the requirements of search so as to subject client to unreasonable risk).

See generally Roady, *Professional Liability of Abstractors, A Symposium on Professional Negligence*, 12 VAND. L. REV. 783 (1959); Wade, *The Attorney's Liability for Negligence, A Symposium on Professional Negligence*, 12 VAND. L. REV. 755 (1959); Comment, *Legal Malpractice in Mississippi*, 43 MISS. L.J. 691 (1972); Comment, *Title Searches: Tort Liability in California*, 7 SANTA CLARA LAW. 257 (1967).

[8] *See generally* Jarchow v. Transamerica Title Ins. Co., 48 Cal. App. 3d 917, 926, 938, 950, 122 Cal. Rptr. 470, 476, 485, 493 (1975) (plaintiffs were awarded $172 for loss of property, $7,184 attorneys' fees, $200,000 damages for emotional distress).

[9] The survey conducted for this comment reflected widely differing practices in Mississippi, especially in the area of reliance on indices in searching title. SURVEY, *supra* note 1.

[10] *See* Home Fed. Sav. & Loan Ass'n v. Spence, 259 Md. 575, 270 A.2d 820, 825 (1970) (liability must be based on breach of duty that is within scope of employment contract).

[11] *See* Chavis v. Martin, 211 Ark. 80, 199 S.W.2d 598, 601-02 (1947) (attorney has duty of "full disclosure" to client); Kubicek & Kubicek, *Selected Topics in Examination of Abstracts of Title*, 26 DRAKE L. REV. 1, 2 (1976) (state has set standards for title examiners).

[12] *Compare* Mumford v. Staton, Whaley & Price, 254 Md. 697, 255 A.2d 359, 363

dard of care required by the courts has varied little from case to case.[13] Indeed, the courts have proceeded on a case-by-case basis with distinctions based more upon the particular practice at issue than upon the application of the standard of care formula. Since many potential errors have never come to the courts' attention,[14] the title examiner is left with only a few specific guidelines drawn from particular cases and some very general expressions of standards to guide his efforts. Because specific guidance is so lacking, this Comment suggests that the duty of full disclosure[15] guide both the attorney in his title search and the courts in their assessment of liability.

I. Theories of Duty

In examining the duty owed a client and the potential for liability inherent in that duty, attention must first focus on the attorney-client relationship.[16] The employment contract establishes this relationship and the scope of the duty created.[17] This duty may be augmented, however, by the standards imposed by the legal profession. By professing to be a competent attorney, the title examiner accepts a certain minimum standard of performance as well as special responsibilities. The standard

(1969) (whether contract or tort theory, gravamen is negligence) *and* Sunset Holding Corp. v. Home Title Ins. Co., 172 Misc. 759, 16 N.Y.S.2d 273, 275 (Sup. Ct. 1939) (regardless of label, the wrong is the same) *with* National Sav. Bank v. Ward, 100 U.S. 195, 197, 200 (1879) (contract basis for action), Lilly v. Boyd, 72 Ga. 83, 84 (1883) (same) *and* Johnson v. Crisler, 156 Miss. 266, 268-69, 125 So. 724, 724-25 (1930) (same). The wording of the complaint may determine which theory of recovery applies. Registered County Homebuilders, Inc. v. Stebbins, 14 Misc. 2d 821, 179 N.Y.S.2d 602, 603-05 (Sup. Ct. 1958).

[13] *See, e.g.*, Jacobsen v. Peterson, 91 N.J.L. 404, 103 A. 983, 984 (1918) ("ordinary care and skill"); Watson v. Calbert Bldg. & Loan Ass'n, 91 Md. 25, 45 A. 879, 881 (1900) ("reasonable degree of skill [and] diligence").

[14] For example, no case was found that deals with a title researcher's failure to check corporate records for change in title through merger. Miss. Code Ann. §§ 79-3-101, 151(d) (1972) provide for the recording of documents of merger with the chancery clerk and the passage of good title to property through merger. *See also* Capital Bank & Trust Co. v. Core, 343 So. 2d 284, 287 (La. Ct. of App. 1977) (corporate officer's authority to transfer property must appear of record).

[15] To alleviate the problem of a client's misunderstanding what is really ethical conduct, the ABA Code of Professional Responsibility, Ethical Consideration 9-2 (1974) mandates that the attorney inform the client of whatever may become material to his interests. This mandate aims at protecting the profession as well as the client from his misperceptions. *Id.*

[16] *See* Wade, *supra* note 7, at 757 (attorney-client relationship gives rise to duty); Comment, *Legal Malpractice in Mississippi*, 43 Miss. L.J. 691, 691-92 (1972) (distinguishing legal malpractice from other attorney-client conflicts); Comment, *Duties in Closing the Estate and the Liabilities for the Breach Thereof*, 36 Miss. L.J. 55, 65-66 (1964) (attorney-client relationship prerequisite to liability).

[17] *See* Adams v. Greer, 114 F. Supp. 770, 775 (W.D. Ark. 1953) (scope of investigation set by abstractor's contract).

of performance is fixed in part by reference to the practice of the local bar,[18] but responsibilities such as the duty of full disclosure cannot be delimited by local custom.[19] Instead, the profession requires that the client be informed of everything material to his interest,[20] because the title examiner cannot be allowed to shield himself from liability by his own silence.

In setting performance standards, the profession does not make the attorney an insurer of his client's success.[21] The Maryland Supreme Court illustrated this point in *Watson v. Calvert Building & Loan Association,*[22] by refusing to hold an attorney to the duty of supplying an accurate abstract of title when he was employed only to render a title opinion. The court reasoned that an attorney hired for a specific task should be under no duty to take extra steps to produce results not called for by the contract.[23] In a more recent case, the Maryland court similarly refused to require an attorney hired only to search for liens to give general advice concerning the state of title.[24]

The contract may call for performance in excess of the usual requirements of a title search. The potential for liability increases accordingly as the result to be obtained becomes more specific. A client may, for example, specify that all defects in the record be reported, although the showing of a technically perfect record is not necessary to establish good title.[25] A higher standard of performance also arises when a client

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[18] *See, e.g.,* Palmer v. Nissen, 256 F. Supp. 497, 499-501 (D. Me. 1966) (employing testimony of local attorneys to determine reasonableness of title search).

[19] Gleason v. Title Guarantee Co., 300 F.2d 813, 814-15 (1962), *rehearing denied with opinion,* 317 F.2d 56, 60 (5th Cir. 1963) (attorney liable because of failure to advise client of local practice of not making complete title searches).

[20] Chavis v. Martin, 211 Ark. 80, 199 S.W.2d 598, 601-02 (1947); ABA CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Consideration 9-2 (1974); Comment, *New Developments in Legal Malpractice,* 26 AM. U.L. REV. 408, 440 nn.168 & 169 (1977).

[21] Maggio v. Abstract Title & Mortgage Corp., 277 A.D. 940, 98 N.Y.S. 2d 1011, 1012-13 (1950) (obligation to use proper care but not to guarantee title); Wade, *supra* note 7, at 760 (universally held that attorney is not his client's insurer).

[22] 91 Md. 25, 45 A. 879 (1900).

[23] 45 A. at 881; *see* Hadley Realty Corp. v. Lawyers Title Corp., 37 N.Y.S.2d 658, 660-61 (1942) (acceptance of search omitting future liens; bound to the search as limited); *cf.* Berman v. Rubin, 138 Ga. App. 849, 227 S.E.2d 802, 805-06 (1976) (attorney not liable for client's misunderstanding of a patently clear document).

[24] Woody v. Mudd, 258 Md. 234, 265 A.2d 458, 464 (1970) (searcher failed to reveal that parties did not hold by the entireties); *cf.* Little Rock Abstract Co. v. Keaton, 239 Ark. 944, 395 S.W.2d 327, 329 (1965) (no duty for abstractor to report encumbrance on adjacent property); Hewitt v. Millis, 159 Ind. App. 684, 309 N.E.2d 162, 166-67 (1974) (no duty for abstractor to report repealed ordinance or moot suit).

[25] Freedom from all possible doubt is not a requirement for marketable title. Even defects of records will not render title unmarketable unless they actually reduce the estate to be conveyed, Presley v. Haynes, 182 Miss. 44, 50, 180 So. 71, 72 (1938) (warranty not breached by immaterial defects). The test in title searches is "reasonable doubt." That

requires that he take a lien of certain priority. This situation occurred in *Gardner v. Wood*,[26] where the client was a guardian who would have breached his fiduciary duty had he taken less than a first lien. Knowing of this special need, the title examiner advised that the guardian could take title. Prior liens, however, encumbered the property. The loss of security entitled the client to sue immediately. The New York court held that the priority guarantee sustained liability even though loss of title was not a certainty.[27] Even without such a guarantee in the contract, a title examiner still promises a specific result to the extent that he warrants the "completeness and accuracy" of his work.[28]

The contract may be relied upon to define the boundaries of the attorney's liability. One court went so far as to allow the contract to set a $1000 limit on liability, even though the breach of duty was considered a tort.[29] A more traditional limit placed on liability pertains to the class of persons to whom a duty is owed. Since the general rule of privity has required a plaintiff to be a party to the contract in order to recover for injury,[30] the attorney traditionally has been considered to owe no duty to third parties. However, the trend is now to permit recovery by any party whom the attorney knows will rely upon the title search.[31] Nevertheless, some courts still require privity even while taking an approach

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is, does the alleged defect make title unmerchantable beyond a reasonable doubt? Wlodarek v. Thrift, 178 Md. 453, 13 A.2d 774, 779 (1940). Thus, the client may sustain expenses in resolving an unreasonable doubt without recourse to the attorney. *See* Clinton v. Miller, 124 Mont. 463, 483, 226 P.2d 487, 498 (1951) (client pursued "frivolous" suit to quiet title); *cf.* Trimboli v. Kinkel, 226 N.Y. 147, 123 N.E. 205, 206-07 (1919) (client may not recover for expenses in defense of obvious defect).

[26] 37 Misc. 93, 74 N.Y.S. 750 (Sup. Ct. 1902).

[27] 74 N.Y.S. at 751; *see* Lawall v. Groman, 180 Pa. 532, 540, 37 A. 98, 99 (1897) ("Plaintiff is entitled to the security she contracted for.").

[28] Registered Country Homebuilders, Inc. v. Stebbins, 14 Misc. 2d 821, 179 N.Y.S.2d 602, 604 (Sup. Ct. 1958) (failure to place limitations in the contract leaves this specific result implied).

[29] Broser v. Royal Abstract Corp., 49 Misc. 2d 882, 268 N.Y.S.2d 594 (Sup. Ct. 1966) (reversing lower court's refusal to apply a contractual limit to tort liability).

Fewer than half the attorneys answering the survey felt that such limitations were ethical. Several attorneys noted the impracticality of contracting for limited liability with commercial clients. One attorney opined, however, that he should be allowed to contract for a liability limited to risks that the client was not informed about by the title report. SURVEY, *supra* note 1. The diversity of opinion is remarkable in view of the prohibition against limitations on liability contained in ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 6-102. One reply to the survey recognized that advising the client was the only protection available. SURVEY, *supra* note 1.

[30] *See, e.g.*, Anderson v. Boone County Abstract Co., 418 S.W.2d 123, 128-30 (Mo. 1967) (no liability where neither privity nor knowledge of reliance).

[31] *See, e.g.*, Capital Bank & Trust Co. v. Core, 343 So. 2d 284, 287-88 (La. Ct. of App. 1977) (discussing trend toward allowing recovery). *But see* Mumford v. Staton, Whaley & Price, 254 Md. 697, 255 A.2d 359, 361-67 (1969) (analyzing trend, but requiring privity).

to the determination of liability essentially based in tort law.[32] Thus, the contract remains an effective means for limiting duty and liability.

II. The Duty to Advise

Regardless of the contract, the client may harbor expectations that the examiner will resolve all doubt about title. To state that this reliance on the examiner is misguided is to ignore that the client usually depends on the attorney for guidance in dealing with all matters of title.[33] As a result of this dependence, the attorney's silence may leave the client unaware of the limits of the title search and at the mercy of his own ignorance. Obviously, the client cannot be expected to understand the significance of a search limited to certain records. The Alabama Supreme Court in *Pinkston v. Arrington*[34] deemed it negligence as a matter of law to omit certain court records from a title search.[35] Similarly, other courts have announced that the restriction of

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[32] *See, e.g.*, Mumford v. Staton, Whaley & Price, 254 Md. 697, 255 A.2d 359, 361-67 (1969) (preserving privity requirement after analysis of trend). *But see, e.g.*, Capital Bank & Trust v. Core, 343 So. 2d 284, 287-88 (La. Ct. of App. 1977) (discussing trend away from privity and allowing tort action); Williams v. Polgar, 391 Mich. 6, 214 N.W.2d 149, 150 (1974) (allowing tort action without privity); Slate v. Boone County Abstract Co., 432 S.W.2d 305, 308 (Mo. 1968) (allowing recovery where reliance known), *overruling in part*, Zweigardt v. Birdseye, 57 Mo. App. 464, 467 (1894) (no liability without privity despite knowledge of reliance).

[33] *See* Family Sav. & Loan, Inc. v. Ciccarello, 207 S.E.2d 157, 163 (W. Va. 1974) (client employs attorney out of "abundance of precaution" and is entitled to rely on professional advice paid for).

The survey conducted for this Comment produced an interesting assortment of perceptions of the client's confusion. One out of four attorneys answering the survey thought their clients viewed a title opinion as a substitute for title insurance. Only one out of eight approved this substitution. One respondent felt that clients did not regard title opinions as the equivalent of insurance, but that they should. Another felt that banks and loan agencies used a title search as a substitute for insurance particularly where small loans are involved. One reply stated that clients regard a title opinion "as a guarantee of good title, but not necessarily as a form of insurance." Another said, "Clients are ignorant of a title opinion and title insurance unless explained to them." Survey, *supra* note 1.

The client is unable to recognize substandard title work and would have to employ a second attorney to discover it. Hendrickson v. Sears, 310 N.E.2d 131, 135 (Mass. 1974) (adopting discovery rule). Consequently, the examiner must ensure that abstracts are complete and not limited by vague clauses. Hamilton v. Binger, 162 Kan. 415, 176 P.2d 553, 557-60 (1947). *See generally* Comment, *supra* note 20; 9 Suffolk U.L. Rev. 1448 (1975) (noting *Hendrickson*).

[34] 98 Ala. 489, 13 So. 561 (1893).

[35] 13 So. at 562-63; *accord*, Contini v. Western Title Ins. Co., 40 Cal. App. 3d 536, 544-47, 115 Cal. Rptr. 257, 261-64 (1974) (lis pendens); Billick v. Davenport, 164 Iowa 105, 145 N.W. 470, 472 (1914) (records of federal court with jurisdiction over property).

Tax records constitute a special problem. *See generally* National Life & Accident Ins. Co. v. Parkinson, 136 F.2d 506, 512 (10th Cir. 1943) (taxes listed as paid, but later court

a search to one index exposes the client to a risk that must be revealed to him.[36] It is not, however, incumbent upon the attorney to explain every practice. In *National Life & Accident Insurance Co. v. Parkinson,*[37] an examiner failed to discover a pending suit to readjust the tax rolls. The local practice was to rely on the records in the treasurer's office, but these records lacked notice of the pending suit. Since this practice was held to be reasonable and was followed by the attorney, the Tenth Circuit allowed the loss to fall upon the client.[38] But only when the practice is so reasonable as to charge the client with notice of its use can the client also be charged with notice of the risk it creates.

In *Gleason v. Title Guarantee Co.,*[39] the Fifth Circuit made it clear that a client would not be charged with notice of a practice so unreasonable that he had no reason to know of its existence. The title examiner in *Gleason* certified title without an actual check of the record, but in accord with the prevailing local practice.[40] Since such a practice was unreasonable, the court held that no client should be forced to accept such a risk.[41] Thus, the client is made to bear the burden of his own ignorance only when the title search is limited by practices that are clearly reasonable. Since the client has sought to remedy his own ignorance through reliance on the attorney's expertise, he is generally justified in relying on the title search.[42] Otherwise, the client would need a

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order readjusted them upward); Adams v. United States, 420 F. Supp. 27, 30 (S.D.N.Y. 1976) (tax lien effective on filing regardless of recording); Murphy v. Fidelity Abstract & Title Co., 114 Wash. 77, 194 P. 591, 594 (1921) (tax lien listed as paid when actually sold).

[36] *See* Crook v. Chilvers, 99 Neb. 684, 157 N.W. 617, 618-19 (1916) (reliance on only one index disapproved); *cf.* Clark v. Reed, 122 So. 2d 344, 349 (La. Ct. of App. 1960) (indexing not required for notice); Corcoran v. Abstract Title Co., 217 Md. 633, 143 A.2d 808, 810-11 (1958) (exception for improper indexing ineffective where at least one index showed correct information). *But cf.* Plaza Corp. v. Alban Tractor Co., Inc., 219 Md. 570, 151 A.2d 170, 176-78 (1959) (indexing essential to notice); Cuthrell v. Camden County, 254 N.C. 181, 118 S.E.2d 601, 602-03 (1961) (indexing required by statute).

[37] 136 F.2d 506 (10th Cir. 1943).

[38] *Id.* at 512. *But cf.* Gleason v. Title Guarantee Co., 317 F.2d 56, 60 (5th Cir. 1963) (local practice inherently unreasonable and client uninformed of risk).

Omissions from the search preclude the client's consideration of any defects that would have been discovered. The decision to accept the risk posed by those defects belongs, however, to the client, not the attorney. Gilman v. Hovey & Buchanan, 26 Mo. 280, 290 (1858). The client is therefore entitled to indemnity against the attorney for any risk he did not have the chance to assume by reason of an omission in the title search. Fay v. McGuire, 20 A.D. 569, 47 N.Y.S. 286, 288, *aff'd per curiam,* 57 N.E. 1109 (N.Y. 1897).

[39] 300 F.2d 813 (1962), *rehearing denied with opinion,* 317 F.2d 56 (5th Cir. 1963).

[40] 300 F.2d at 814 (land boom put pressure on title examiner to approve title, but title records did not contain recent findings).

[41] 317 F.2d at 60.

[42] The client exercises caution when he comes to the first attorney and should be allowed to rely on the advice given. *See* Family Sav. & Loan, Inc. v. Ciccarello, 207 S.E.2d 157, 163 (W. Va. 1974) (adopting discovery rule to protect reliance for a reasonable time).

second attorney to check the work of the first. A failure to seek a second opinion should not prevent the client from claiming he was inadequately advised of the record[43] any more than constructive notice would deny him the right to sue.[44]

In *Thorne v. Johnson*,[45] a Missouri court explicitly refused to charge the client with constructive knowledge of the record when it would have denied him the right to rely on an abstractor's report.[46] Similarly, the Mississippi Supreme Court, in *Pruett v. Mississippi Valley Title Insurance Co.*,[47] refused to charge an insured party with notice of possession where the insurer had searched the records but failed to report the recorded evidence of adverse title. The court stated that the insured should not be required to make an independent search after obtaining a policy from the title insurance company.[48]

Most clients simply cannot judge the quality of a title search any better than they can judge the quality of title for themselves. The client is therefore entitled to more than a mere abstract from his attorney; he is entitled to advice.[49] If he receives a false impression of the state of title

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[43] *See* Hendrickson v. Sears, 310 N.E.2d 131, 136 (Mass. 1974) (adopting discovery rule to extend cause of action to time when client might reasonably be expected to learn of defects); *cf.* Clinton v. Miller, 124 Mont. 463, 483, 226 P.2d 487, 498 (1951) (second opinion proved wrong after "frivolous" suit). *See generally* Comment, *supra* note 20, at 439 (advocating discovery rule); 9 SUFFOLK U.L. REV. 1448, 1455 (1975) (analyzing impact of discovery rule in *Hendrickson*).

[44] *See* Pruett v. Mississippi Valley Title Ins. Co., 271 So. 2d 920, 922-23 (Miss. 1973) (insurer cannot rely on client's failure to conduct search of his own to defeat liability).

[45] 483 S.W.2d 658 (Mo. Ct. App. 1972).

[46] *Id.* at 663 (terming the defense "absurd").

[47] 271 So. 2d 920 (Miss. 1973) (involving a title insurance company that also performed a title examination).

[48] *Id.* at 922-23; *cf.* Shotwell v. Transamerica Title Ins. Co., 16 Wash. App. 627, 558 P.2d 1359, 1361 (1976) (insurer normally performs a title search; must report title defects to insured).

[49] *See* Owen v. Neely, 471 S.W.2d 705, 708 (Ky. 1971) (lawyer receiving information that should reasonably put him on notice of a title defect has a duty to investigate or report it to his client); *cf.* Smith v. St. Paul Fire & Marine Ins. Co., 366 F. Supp. 1283, 1290 (M.D. La. 1973) (attorney must advise client of possible consequences), *aff'd per curiam*, 500 F.2d 1131 (5th Cir. 1974). An attorney differs from an abstractor who expresses no opinion on the state of title. *See* McLain v. Alexander, 235 Ark. 64, 357 S.W.2d 1, 2 (1962) (abstract merely facilitates an examination); Morin v. Divide County Abstract Co., 48 N.D. 214, 183 N.W. 1007, 1008 (1921) (abstractor expresses no opinion on record); State *ex rel* Doria v. Ferguson, 145 Ohio St. 12, 16, 60 N.E.2d 476, 478 (1945) (certificate without opinion on state of title is not practice of law). *But cf.* Ford v. Guarantee Abstract & Title Co., 220 Kan. 244, 553 P.2d 254, 264-66 (1976) (company performing title search held to same duty as attorney); Wacek v. Frink, 51 Minn. 282, 53 N.W. 633, 634 (1892) (abstractor indicating legal effect of record must use "due care and skill"). *See also* Federal Farm Corp. v. Schmidt, 109 Colo. 467, 126 P.2d 1036, 1040 (1942) (abstract does not show possession required for marketable title); Leath v. Weaver, 202 S.W.2d 125, 130 (Mo. Ct. App. 1947) (abstract reveals record title, not title in fact).

instead of full advice about potential defects, the client is in a more dangerous position than before he sought the attorney's help. Before, he was aware of his ignorance of the state of title; afterwards, he is motivated by false confidence. This false confidence can be passed on to others with injury resulting years following the improper title search.[50] Therefore, if the title search cannot clear all doubt about the title, the attorney must give advice adequate to prevent injury to the client and the successor in title, thereby protecting both his client and himself.

III. Theories of Recovery

A. Contract Theory

Historically, recovery for an injury sustained as a result of an improper title search was based exclusively on breach of contract.[51] The attorney's misconduct has been recognized as the basis for liability, but the breach of a contractual duty, rather than the occurrence of damages, has been the focus for the determination of liability. Although originating from negligence in the performance of a duty, the breach of contract cause of action was considered to accrue immediately upon delivery of a false title report.[52] The modern trend, however, is to expand the theory of recovery to avoid the limitations of privity[53] and the statutes of limitations[54] where liability is based on breach of contract.

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[50] *See, e.g.*, Hendrickson v. Sears, 310 N.E.2d 131, 135 (Mass. 1974) (injury discovered after statute of limitations), *noted in* 9 Suffolk U.L. Rev. 1448, 1455 (1975) (discovery rule means liability potential increases with time in practice).

[51] *See, e.g.*, National Sav. Bank v. Ward, 100 U.S. 195, 197-98 (1879) (requiring employment contract to create duty).

[52] Lilly v. Boyd, 72 Ga. 83, 84 (1883).

[53] *See, e.g.*, Capital Bank & Trust Co. v. Core, 343 So. 2d 284, 287-88 (La. Ct. of App. 1977) (applying abstractor cases to case of attorney's misrepresentation); *cf.* Hawkins v. Oakland Title Ins. & Guar. Co., 165 Cal. App. 2d 116, 331 P.2d 742, 749-50 (1958) (recovery only where reliance known by abstractor); Williams v. Polgar, 391 Mich. 6, 215 N.W.2d 149, 157 (1974) (tort action used to avoid privity requirement for abstractors). *But see* Mumford v. Staton, Whaley & Price, 254 Md. 697, 244 A.2d 359, 363 (1969) (adopting discovery rule but retaining privity requirement); Anderson v. Boone County Abstract Co., 418 S.W.2d 123, 128 (Mo. App. 1967) (abstractor not liable for defects to one not in privity with him and of whom he had no knowledge). *See also* Long v. American Sav. & Loan Ass'n, 151 A.2d 770, 772-73 (D.C. 1959) (lender does not misrepresent title to borrower by approving loan after title search); Goodman v. Title Guarantee & Trust Co., 11 A. D. 2d 1003, 206 N.Y.S.2d 32, 34 (1960) (per curiam) (insurer reported easement as uninsurable, no cause for misrepresentation without fraud despite knowledge of reliance).

[54] *See, e.g.*, Mumford v. Staton, Whaley & Price, 254 Md. 697, 255 A.2d 359, 363 (1969) (adopting discovery rule); *cf.* Hillock v. Idaho Title & Trust Co., 22 Idaho 440, 126 P. 612, 615 (1912) (cause of action should not be barred before damage matures). *But see* St. Paul Fire & Marine Ins. Co. v. Crittenden Abstract & Title Co., 255 Ark. 706, 502 S.W.2d 100, 102-04(1973) (statute runs from delivery of abstract, not discovery of defect); Johnson v. Crisler, 156 Miss. 266, 268-69, 125 So. 724, 724-25 (1930) (cause in contract

B. Tort Theory

Today, a second theory of liability is gaining acceptance in many jurisdictions. Recognizing the duty of full disclosure and the client's right to rely on the work of the professional he retains, some courts have allowed the cause of action to sound in tort. Therefore, for a negligence cause of action,[55] recovery would be available to foreseeable plaintiffs[56] who file their actions within the statutory time period which runs from the time injury is or should have been discovered.[57] Because the intended reliance on certification of title should be obvious,[58] the tort action of negligent misrepresentation may be allowed to circumvent the strictures of a contract cause of action.[59] Additionally, where the misrepresentation is intentional, the tort action may rise to the level of fraud.[60] Expansion of recovery against the attorney has not yet encompassed an action for negligent infliction of emotional distress,[61] but such

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barred by statute of limitations); Cecala v. Title Guarantee Co., 45 Misc. 2d 986, 258 N.Y.S.2d 464, 468 (Sup. Ct. 1965) (same).

[55] Regardless of the pleadings, the substance of the cause of action is negligence. Mumford v. Staton, Whaley & Price, 254 Md. 697, 255 A.2d 359, 363 (1969).

[56] *See* Williams v. Polgar, 391 Mich. 6, 215 N.W.2d 149, 157 (1974) (cause of action arising from breach of abstractor's duty runs to persons the abstractor could reasonably foresee would rely on the accuracy of the abstract); *cf.* Lawall v. Groman, 180 Pa. 532, 540, 37 A. 98, 99 (1897) (attorney is bound to use "reasonable care and skill," even where title search might be a gratuitous undertaking, because reliance was foreseen).

[57] *See, e.g.,* Family Sav. & Loan Inc. v. Ciccarello, 207 S.E.2d 157, 163 (W. Va. 1974) (adopting discovery rule).

[58] The right to rely on a title search has been denied only where the clients had prior knowledge of the unreported defect. *See* Crawford Lumber Co. v. Abstract Guar. Co., 253 Iowa 705, 113 N.W.2d 703, 705-06 (1962) (no cause of action where plaintiff had knowledge of unsatisfied judgment lien omitted from the abstract); Collins v. Slocum, 317 So. 2d 672, 680 (La. Ct. of App.) (knowledge precludes reliance), *cert. denied,* 321 So. 2d 362, 363, 364 (La. 1975); Maggio v. Abstract Title & Mortgage Corp., 277 A.D. 940, 98 N.Y.S.2d 1011, 1012-13 (1950) (no recovery for negligently made tax search where plaintiff had knowledge). *But cf.* Guaranty Abstract Co. v. Denman, 209 S.W.2d 213, 214-15 (Tex. Ct. App. 1948) (knowledge of dealings insufficient to impart notice of results).

[59] *See* Williams v. Polgar, 391 Mich. 6, 215 N.W.2d 149, 150 (1974) (negligent misrepresentation where reliance foreseen); Chun v. Park, 51 Haw. 462, 501, 462 P.2d 905, 909 (1969) (same). *But see* Anderson v. Boone County Abstract Co., 418 S.W.2d 123, 128-30 (Mo. 1967) (no negligent misrepresentation where reliance not foreseen).

[60] *See* Capital Bank & Trust Co. v. Gore, 343 So. 2d 284, 288-89 (La. Ct. of App. 1977) (certification without search); *cf.* Thomas v. Schee, 80 Iowa 237, 45 N.W. 539, 540-41 (1890) (attorney liable on warranty for falsely certifying title to his own property).

[61] Recovery has been allowed against a title insurer for negligent infliction of emotional distress. *See* Jarchow v. Transamerica Title Ins. Co., 48 Cal. App. 3d 917, 932-40, 122 Cal. Rptr. 470, 480-86 (1975) (discovered encumbrance, failed to report it, failed to exclude it from insurance, and failed to defend title under insurance contract).

Mississippi has recognized the tort of negligent infliction of emotional distress. *See* First Nat'l Bank v. Langley, 314 So. 2d 324, 329 (Miss. 1975) (duty to examine deposit chute for bank deposit).

a theory may be available to create liability even absent direct economic injury.[62] The realization by the courts that acceptance of faulty title inherently damages the purchaser may have inspired cognizance of a contract cause of action immediately upon receipt of a false title report.[63] Allowing a tort action now enables a client to recover for his actual injuries when they reasonably manifest themselves without engaging a succession of experts to check each other's work. Furthermore, permitting tort actions protects the profession by allowing the client to rely on the services which he reasonably expected the attorney to perform.[64]

IV. The Standard of Care

Whether considering the breach of duty a tort or a contract cause of action, most courts express the standard of care[65] involved in quite similar terms.[66] Each expression deals with the required "care" and "skill" to be exercised by the title examiner. The "care" aspect concerns the diligence to be exercised in executing the search,[67] while the requisite "skill" refers to knowledge and expertise.[68]

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[62] *See* Tuohey, *Negligent Infliction of Emotional Distress Arising from a Breach of Contract: Jarchow v. Transamerica Title Insurance Company*, 8 S.W.U. L. Rev. 655, 669-71 (1976) (criticizing the failure to extend liability for emotional distress only).

[63] Originally, the cause arose on delivery of a false report, and the client was entitled immediately to damages, however nominal. Lilly v. Boyd, 72 Ga. 83, 94 (1883).

[64] *See* Comment, *Duties in Closing the Estate and Liabilities for the Breach Thereof*, 36 Miss. L.J. 55, 68 (1964) ("the attorney who injures his client from professional negligence also damages the remainder of the bar in the eye of the public").

[65] *See generally* Wade, *supra* note 7; Comment, *Attorney Malpractice*, 63 Colum. L. Rev. 1292, 1294-1307 (1963); Note, *Standard of Care in Legal Malpractice*, 43 Ind. L.J. 771 (1968).

[66] Although the terms have been similar, formulations of the standard of care have not been perfectly consistent. *See, e.g.*, Toth v. Vayquez, 22 Del. 224, 65 A.2d 778, 780 (1949) ("ordinary care, knowledge, and skill"); Watson v. Calvert Bldg. & Loan Ass'n, 91 Md. 25, 45 A. 879, 881 (1900) ("reasonable degree of skill [and] diligence"); Clinton v. Miller, 124 Mont. 463, 483, 226 P.2d 487, 488 (1951) ("reasonable degree of care or skill and to possess to a reasonable extent the knowledge requisite to a proper performance of his duties"); Jacobsen v. Peterson, 91 N.J.L. 404, 103 A. 983, 984 (1918) ("ordinary care and skill"); *cf.* Nause v. Goldman, 321 So. 2d 304, 308 (Miss. 1975) ("reasonable care and skill" required in conduct of litigation). The most informative expression of the standard is found in Dodd v. Williams, 3 Mo. App. 278 (1877):

> By their profession they are bound to have a sufficient knowledge of law to know what is and what is not a lien upon real estate in this county, and to use sufficient diligence to find any such incumbrance when properly made a matter of record, so as to affect all parties interested with notice.

Id. at 281.

[67] For purposes of analysis, care and diligence are not distinguished here. One court has, however, made a distinction in its formula. *See* Wlodarek v. Thrift, 178 Md. 453, 13 A.2d 774, 779 (1940) ("reasonable and ordinary care and diligence").

[68] Skill and knowledge are sometimes treated as separate requirements. *See* Toth v.

It should be noted that "good faith" is always required,[69] though not always mentioned. Sometimes the standard seemingly takes a subjective form,[70] such as "to the best of *his* skill."[71] "Diligence" or "care," however, are terms always used with modifiers such as "reasonable" and "ordinary,"[72] which indicate an objective standard.[73] An argument can be made, however, for formulating the standard of skill in subjective terms since the client should be entitled to whatever expertise the attorney has developed in his practice.[74] Obviously, the choice of a particular attorney is commonly induced by reputation and experience,[75] but regardless of reputation or experience, all attorneys are held to have knowledge of the settled law in their jurisdiction.[76] The time has long since passed when delays in communication enabled an attorney to argue his ignorance of a particular matter of law as a defense.[77] Therefore, the knowledge element in the skill standard must meet an objective test, insofar as the applicable law is settled. To the extent that the

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Vayquez, 22 Del. 224, 65 A.2d 778, 780 (1949) ("ordinary care, knowledge, and skill"); Moorehead's Trustee v. Anderson, 125 Ky. 77, 100 S.W. 340, 343 (1907) (liability created by "ignorance of the law relating to titles or . . . failure to exercise reasonable care and skill").

[69] Humboldt Bldg. Ass'n v. Ducker's Ex'x, 111 Ky. 759, 64 S.W. 671, 673 (1901) (showing of good faith required prior to showing of skill and diligence).

[70] *See generally* Comment, *supra* note 20, at 410 (advocating objective standards).

[71] Palmer v. Nissen, 256 F. Supp. 497, 501 (D. Me. 1966) (quoting Wilson v. Russ, 20 Me. 421, 424 (1841)); *see* National Sav. Bank v. Ward, 100 U.S. 195, 198 (1879) (no liability if attorney acts to "best of his knowledge").

[72] See note 66 *supra*.

[73] An objective standard can be defended on the basis of the client's right to receive advice, at least as good as the community standard, without allowance for the personal characteristics of the attorney. Comment, *supra* note 20, at 410; *cf.* Smith v. Lewis, 118 Cal. Rptr. 621, 625-27, 530 P.2d 589, 593-95 (1975) (attorney judged by standards of practice and according to knowledge of law commonly available at time of alleged malpractice).

[74] Few courts have charged the attorney with a specialist's standard of care. *See* Wright v. Williams, 47 Cal. App. 3d 802, 810-11, 121 Cal. Rptr. 194, 199 (1975) (justifying a specialist's standard as the standard of those similarly situated); *cf.* Childs v. Comstrock, 69 A.D. 160, 165, 74 N.Y.S. 643, 646 (1902) (long experience should inform attorney of risks in practice). *See generally* Comment, *Legal Effects of Attorney Specialization,* 30 ALB. L. REV. 282, 284 (1966); Comment, *supra* note 20, at 411-13; Note, *supra* note 65, at 787-89.

[75] Comment, *supra* note 20, at 414.

[76] *E.g.,* Clinton v. Miller, 124 Mont. 464, 483, 226 P.2d 487, 498 (1951) ("Such title examiner should be familiar with the statutes and decisions of his own state and he must apply the settled rules of law that should be known to all conveyancers."); *cf.* Citizen's Loan & Sav. Ass'n v. Friedley, 123 Ind. 143, 23 N.E. 1075, 1076 (1890) (reliance on precedent of highest state court is not negligence).

[77] *See* Pitt v. Yalden, 98 Eng. Rep. 74, 75 (K.B. 1767) (attorneys in the country not required to know recent decisions). It seems strange indeed that those engaged in the legal profession should be excused from knowing the law while the laity is denied the excuse of ignorance of the law in their secular affairs. Wade, *supra* note 7, at 755.

law remains unsettled, the standard seems to be one of good faith.[78] Numerous cases have articulated both the care and skill standards in such objective forms as "a reasonable degree of care or skill and . . . to a reasonable extent the knowledge requisite to a proper performance of his duties"[79] and, more succinctly, "ordinary care and skill."[80]

V. Local Custom

What is "reasonable" or "ordinary" in title searches depends in large part on what constitutes "marketable title."[81] Both concepts set forth acceptability in terms of the locality, and the courts have therefore looked to local practice in defining minimum standards.[82] While some courts may apply a local standard of practice, others may choose state-wide standards.[83] Although still prominent in many jurisdictions, the use of local standards would apparently undercut the rationale behind

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[78] *See* Citizen's Loan & Sav. Ass'n v. Friedley, 123 Ind. 143, 23 N.E. 1075, 1076 (1890) (good faith reliance on precedent precludes liability); Humboldt Bldg. Ass'n Co. v. Ducker's Ex'x, 111 Ky. 759, 64 S.W. 671, 673 (1901) (after good faith shown, reasonable doubt as to law allowed as defense).

[79] Clinton v. Miller, 124 Mont. 463, 483, 226 P.2d 487, 498 (1951).

[80] Jacobsen v. Peterson, 91 N.J.L. 404, 103 A. 983, 984 (1918).

[81] Marketable title does not mean technically perfect title, Presley v. Haynes, 182 Miss. 44, 50, 180 So. 71, 72 (1938); nor does marketable title mean that title is good. Ninth Ave. & Forty-Second St. Corp. v. Zimmerman, 217 A.D. 498, 217 N.Y.S. 123, 126 (1926). The question of liability for a title search requires an inquiry into the materiality of the defects themselves in terms of the setting in which the property is located. *See* Palmer v. Nissen, 256 F. Supp. 497, 501 (D. Me. 1966) (defects found not material under local standards); Clinton v. Miller, 124 Mont. 463, 484-85, 226 P.2d 487, 498 (1951) (defects immaterial; seller had remedy for buyer's refusal of title).

[82] *See* Gleason v. Title Guarantee Co., 300 F.2d 813, 814 (1962) (custom provides guide for deciding what is reasonable), *rehearing denied with opinion*, 317 F.2d 56 (5th Cir. 1963); Palmer v. Nissen, 256 F. Supp. 497, 500-01 (D. Me. 1966) (permitting testimony of local practitioner on custom and materiality of defects); Dodd v. Williams, 3 Mo. App. 278, 281 (1877) (examiner must know what is an encumbrance locally).

Expert testimony is usually accepted, but not always required. *See, e.g.*, Palmer v. Nissen, 256 F. Supp. 497, 500-01 (D. Me. 1966) (testimony on reliance, on recitals and on absence of certain records in the choice of title). *But see* Wlodarek v. Thrift, 178 Md. 453, 13 A.2d 774, 782 (1940) (merchantability is question of law for court—no expert testimony required). *See generally* Wade, *supra* note 7, at 776; Comment, *supra* note 20, at 430-32; Comment, *Improving Information on Legal Malpractice*, 82 Yale L.J. 590 (1973).

In the survey for this Comment, only one respondent displayed any awareness of local practice as a measure for the standard of performance. Survey, *supra* note 1.

[83] *Compare, e.g.*, Palmer v. Nissen, 256 F. Supp. 497, 500-01 (D. Me. 1966) (local standard for title searches) *and* Ramp v. St. Paul Fire & Marine Ins. Co., 263 La. 774, 269 So. 2d 239, 244 (1972) (local standard in litigation) *with* Rolfstad, Winkjer, Suess, McKennett & Kaiser, P.C. v. Hanson, 221 N.W.2d 734, 737 (N.D. 1974) (state-wide standard for litigators) *and* Cook, Flanagan & Berst v. Clausing, 73 Wash. 2d 393, 438 P.2d 865, 866-67 (1968) (same).

state-wide requirements for admission to the bar.[84] Nevertheless, the peculiarities of the locale may in certain instances establish different standards[85] for titles and, consequently, for title searches.

The Fifth Circuit faced a situation of this nature in *Gleason v. Title Guarantee Co.*,[86] in which a land boom forced a change in the local conditions for title practice. In *Gleason,* real estate transactions had become so numerous that the county clerk's office was overloaded with filings for the record, and both the records and the indices of the office were several weeks out of date. Consequently, the near impossibility of bringing title properly up to date had spawned the practice of certification based only upon a telephone check with the clerk's office.[87] With land in such great demand, the pressure to expedite sales could easily have lowered the standard for good title. In *Gleason,* the Fifth Circuit acknowledged that local practice could be a persuasive guide in determining what was reasonable in this peculiar situation, but the court refused to be controlled by local customs.[88] It concluded rather that the practice in question was obviously unreasonable and could not be redeemed by invoking the name of custom.[89] Thus, a lack of diligence was not justified by the local practice in *Gleason.*

By comparison, a lack of skill seems even less defensible in matters of settled law.[90] In *Humboldt Building Association Co. v. Ducker's Executrix,*[91] the Kentucky Supreme Court did, however, refer to local practice to determine whether a matter of law was in fact settled.[92]

A reference to the local setting could also establish the individual reputation of the title examiner and the degree of expertise commonly expected of him. In many cases a client selects an attorney based on such a reputation, and the client always approaches the attorney because of his special knowledge of the law and his ability to advise as to its consequences and effects. These considerations suggest that the client should be allowed to expect varying degrees of skill according to the experience of the practitioner.[93] The courts, however, have gone no

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[84] A state-wide standard is appropriate when state law is at issue; but a local standard may be appropriate when peculiarly local procedures are in question. Comment, *supra* note 20, at 416-17.

[85] *See* Cook v. Irion, 409 S.W.2d 475, 478 (Tex. Ct. App. 1966) (matters of judgment may be determined by consideration of local conditions).

[86] 300 F.2d 813 (1962), *rehearing denied with opinion,* 317 F.2d 56 (5th Cir. 1963).

[87] 300 F.2d at 814.

[88] *Id.*, 317 F.2d at 60.

[89] 317 F.2d at 60; *cf.* Hamilton v. Binger, 162 Kan. 415, 176 P.2d 553, 557-60 (1947) (omission of early probate records not accepted by court despite custom).

[90] See notes 74 through 80 and accompanying text *supra.*

[91] 111 Ky. 759, 64 S.W. 671 (1901).

[92] 64 S.W. at 673 (defense that local bar believed law unsettled was a question for trier of fact).

[93] See notes 74 through 80 and accompanying text *supra.*

further than to require that the title examiner simply know the settled rules of conveyancing,[94] which supposedly would be only a subset of the settled rules of law. The attorney is therefore left with only the general objective standard of care and local practice by which to guide his work. However, some further guidance may be gleaned from an analysis of specific practices the courts have found violative of the standard of care.

VI. Breaches of Duty

The standard of care may be violated in four different ways. The first form this breach of duty may take is the total omission of a search. Obviously, a total failure to "search" readily gives rise to liability,[95] but a failure to search in part may still be defensible.[96] The second violation of the standard of care results from the failure to find. Having contracted to perform a title search, the attorney must resort to the public records to discover the necessary information. When the records direct him to other pertinent sources of information, he has a duty to make reasonable inquiry outside the records in order to complete the search accurately.[97] Furthermore, whatever information he discovers must be interpreted, thus giving rise to the third type of possible error. It should be noted, however, that not all errors in interpretation establish liability. The attorney's judgment is not required to be absolutely correct,[98] but in exercising his judgment he is required to take into account the settled law of the jurisdiction.[99] The fourth violation of the standard of care occurs in the attorney's report to the client, or the omission thereof. The failure to report what is discovered can create liability as surely as the total failure to search.[100] Furthermore, any uncertainty in interpretation should logically be grounds for a full report to the client explaining

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[94] *See, e.g.*, Clinton v. Miller, 124 Mont. 463, 483-84, 226 P.2d 487, 498 (1951) (must know statutes, cases and rules of conveyancing).

[95] *See, e.g.*, Capital Bank & Trust Co. v. Core, 343 So. 2d 284, 289 (La. Ct. of App. 1977) (finding fraud).

[96] *See, e.g.*, Ryczkowski v. Chelsea Title & Guar. Co., 85 Nev. 37, 449 P.2d 261, 262 (1969) (no requirement to search for records outside chain of title).

[97] *See* Dead River Fishing & Hunting Club v. Stovall, 147 Miss. 385, 395-96, 113 So. 336, 337-38 (1927) (purchaser charged with notice of all that would be revealed by a reasonable investigation of facts appearing in the recitals in the chain of title or in any conveyance of record by the vendor).

[98] *See* Hopper v. Gurtman, 17 N.J. Misc. 289, 8 A.2d 376, 380 (1939) (no liability for error in judgment without negligence). *But cf.* Cook, Flanagan & Berst v. Clausing, 73 Wash. 2d 393, 438 P.2d 865, 866-67 (1968) (rejecting statement of no liability for "mere error in judgment" in litigation).

[99] *See, e.g.*, Clinton v. Miller, 124 Mont. 463, 483, 226 P.2d 487, 498 (1951) (must know statutes, decisions, and settled rules of conveyancing).

[100] *See, e.g.*, Henkels v. Philadelphia Title Ins. Co., 177 Pa. Super. 110, 110 A.2d 878, 880 (1959) (insurer-searcher failed to report tax lien and excluded tax liens from policy).

the nature of the uncertainty.[101] Thus, the failure to advise the client about risks which may be apparent may readily sustain a finding of liability.[102] In one sense, no liability develops except through a failure to give the client a correct report.[103] Moreover, an error in searching or a failure to find may be the result of an incorrect interpretation.[104] As already noted, unresolved uncertainties must be reported. Thus, the four kinds of errors and omissions may be separable analytically, but they are often inseparable in fact and manifest themselves in one final form in the title opinion.

A. The Failure to Search

A total failure to search clearly results in a fraudulent certification of title. In *Capital Bank & Trust Co. v. Core,*[105] the Louisiana Court of Appeals did not hesitate to characterize a failure to search as fraud, where the record showed a prior lien, a lack of capacity in the grantor, and a lesser interest than was purported to have been conveyed.[108] On the other hand, other courts have found liability without specifically finding fraud. In *Chavis v. Martin,*[107] the Arkansas Supreme Court only hinted at fraud when an attorney used funds paid for the search to purchase title from the state, when the records would have revealed that the state lacked valid title.[108] Similarly, the Maryland Supreme Court failed to discuss the possibility of fraud in *Wlodarek v. Thrift,*[109] but found liability where a check of the records would have revealed a suit quieting title against the grantor.[110] Even where the attorney admitted his failure to search in *Gleason v. Title Guarantee Co.,*[111] no finding of fraud was made, perhaps because under the unusual circumstances of

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[101] Owen v. Neely, 471 S.W.2d 705, 708 (Ky. 1971) (if put on inquiry, attorney must investigate or report facts to client).

[102] *See* Gleason v. Title Guarantee Co., 317 F.2d 56, 60 (5th Cir. 1963) (client having no cause to know of risk, attorney bears the loss); *cf.* Gilmore v. Hovey & Buchanan, 26 Mo. 280, 290 (1858) (client must be given opportunity to accept or reject risk); Gardner v. Wood, 37 Misc. 93, 74 N.Y.S. 750, 751 (Sup. Ct. 1902) (risk need not become complete loss before client may recover).

[103] *See* Lilly v. Boyd, 72 Ga. 83, 84 (1884) (delivery of false report, rather than occurence of damages, gives cause of action).

[104] *See, e.g.,* Byrnes v. Palmer, 18 A.D. 1, 45 N.Y.S. 479, 483-84 (1897) (misreading description caused failure to locate correct chain of title).

[105] 343 So. 2d 284 (La. Ct. of App. 1977).

[106] *Id.* at 287-89.

[107] 211 Ark. 80, 199 S.W.2d 598 (1947).

[108] 199 S.W.2d at 601-02 (tax sale invalid because title held by nontaxable governmental unit).

[109] 178 Md. 453, 13 A.2d 774 (1940).

[110] 13 A.2d at 779 (reversing summary judgment for attorney and remanding for trial).

[111] 300 F.2d 813 (1962), *rehearing denied with opinion,* 317 F.2d 56 (5th Cir. 1963).

that case, local practice supported the omission of a search.[112] Nevertheless, the court held the attorney liable since the client had no reason to know of the local practice or to appreciate the risk it forced upon him.[113] Thus, the courts have been consistently willing to impose liability, though not always willing to find fraud, whenever the title examiner has entirely failed to perform a search.

When some search is attempted, liability may still accrue through certain omissions that make it incomplete. A failure to search in part may mean that some parties,[114] records,[115] or certain kinds of title defects[116] have been omitted from consideration. Although it is sometimes said that title examiners must find all pertinent matters of record,[117] reasonable limits must be set in order to make a search feasible.[118] Practically, perfect title is not required,[119] and a perfect title search cannot be demanded.[120] Indeed, a showing of defective title has never been conclusive in regard to liability in title search cases.[121]

Moreover, certain omissions in a title search have been either approved or excused. For example, the courts generally approve the exclusion of matters outside the chain of title.[122] In *Dodd v.*

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[112] 300 F.2d at 814.

[113] 317 F.2d at 60.

[114] *See, e.g.*, Joseph v. Greater New Guide Baptist Church, Inc., 194 So. 2d 127, 129-30 (La. Ct. of App. 1966) (necessary heir omitted).

[115] *See, e.g.*, Hamilton v. Binger, 162 Kan. 415, 176 P.2d 553, 557-60 (1947) (probate records omitted).

[116] *See, e.g.*, Woody v. Mudd, 258 Md. 234, 265 A.2d 458, 463-64 (1970) (searching for liens only); *cf.* McVeigh v. Chicago Mill & Lumber Co., 96 Ark. 480, 485, 490-91, 132 S.W. 638, 639, 642 (1910) (search included special acts of Congress affecting title).

[117] *See, e.g.*, Jarchow v. Transamerica Title Ins. Co., 48 Cal. App. 3d 917, 938-39, 122 Cal. Rptr. 470, 485 (1975) (duty to list all matters of record); Ryan v. Brady, 34 Md. App. 41, 66 A.2d 745, 752 (1976) (examiner charged with whatever appears of record within the chain of title).

[118] *See* Palmer v. Nissen, 256 F. Supp. 497, 499-501 (D. Me. 1966) (no check outside jurisdiction for probate records).

[119] *See, e.g.*, Presley v. Haynes, 182 Miss. 44, 50, 180 So. 71, 72 (1938) (technical defects in record title did not breach warranty of title).

[120] *See, e.g.*, Owen v. Neely, 471 S.W.2d 705, 707-08 (Ky. 1971) (facts sufficient to put attorney on inquiry must be investigated or reported to client).

[121] *See, e.g.*, Wlodarek v. Thrift, 178 Md. 453, 13 A.2d 774, 779 (1940) (title must be defective beyond a reasonable doubt at time of title search for liability to accrue).

[122] *See, e.g.*, Dodd v. Williams, 3 Mo. App. 278, 280-82 (1877) (grantor acquired title after giving a deed of trust); Ryczkowski v. Chelsea Title & Guar. Co., 85 Nev. 37, 449 P.2d 261, 262 (1969) (encumbrance of record before state issued patent); *cf.* Turner v. Bell, 143 Miss. 782, 786, 109 So. 794, 795 (1926) (abstractor not required to search all records to find encumbrances by strangers to the chain of title). *But cf.* Burkett v. Peoples Bank, 225 Miss. 291, 299, 83 So. 2d 185, 188 (1955) (grantee charged with all conveyances of record by grantor); Wood v. Garnett, 72 Miss. 78, 85-87, 16 So. 390, 391-92 (1890) (deed filed for record is notice, although out of chain).

Mississippi attorneys took a variety of positions on the question of what the title

Williams,[123] the Missouri Court of Appeals considered whether the doctrine of estoppel by deed required a title searcher to trace a grantor's name beyond the point where he obtained title. Since the doctrine was designed to prevent the unjust assertion of title by a grantor, the court refused to extend its application to a purchaser, or his title searcher, who had no part in the grantor's misdeeds.[124] Thus, the Missouri court required the title searcher to establish the chain of title only to the point where a grantor acquired title and then to run the next grantor's name to the point where he acquired title. In a somewhat similar situation, the Mississippi Supreme Court decided in *Turner v. Bell*[125] that an abstracter was not required to discover a deed of trust that was not indexed under the name of any party in the chain of title.[126]

As a further exclusion courts also allow the omission of future liens and liens on other property. This general rule is illustrated by *Hadley Realty Corp. v. Lawyers Title Corp.*,[127] in which a New York court denied recovery for omission from the title search of an application for removal of railroad structures. The application was on file in the clerk's office at the time of the search, but was not reported in the title opinion. After the title report was delivered, the application was approved and an assessment was levied against the client for the improvement resulting from the removal. Since approval occurred only after the search, the assessment was considered a future lien and was therefore deemed to be beyond the coverage of the title search.[128]

As an additional exclusion, some courts have allowed the searcher to disregard names in the indices that vary only slightly from those within the chain of title. Thus, in *Turk v. Benson*,[129] the North Dakota

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searcher must find. Those answering the survey divided two against one in disapproving a requirement for investigating matters which are incorrectly indexed. One out of six felt, however, that matters outside the record should be investigated. Three out of eight attorneys thought matters in the general index should be found, but twice as many felt that matters in the tract index should be found. Only one claimed the right to rely on the general index exclusively. SURVEY, *supra* note 1. The implication of these opinions is that the majority would allow the title searcher to rely upon the chain of title shown in the tract index. An overwhelming majority would nevertheless require the title searcher to inquire outside the record for matters suggested by the record. *Id.*

[123] 3 Mo. App. 278 (1877).

[124] *Id.* at 280-90.

[125] 143 Miss. 782, 109 So. 794 (1926).

[126] *Id.* at 786, 109 So. at 795 (conveyance not recorded but referenced in deed of trust outside chain of title).

[127] 37 N.Y.S.2d 658 (1942).

[128] 37 N.Y.S.2d at 660-61; *cf.* Johnson v. Crisler, 156 Miss. 266, 268-69, 125 So. 724, 724-25 (1930) (side-stepping future lien question by denying cause of action because of statute of limitations). *See also* Little Rock Abstract Co. v. Keaton, 239 Ark. 944, 395 S.W.2d 327, 329 (1965) (no report required for lien on adjacent property).

[129] 30 N.D. 200, 152 N.W. 354 (1915).

Supreme Court imposed no liability for disregarding the name "William J. Rideout" while searching title on "William G. Rideout."[130] Furthermore, it is a generally accepted rule that the searcher may rely upon the record as it appears[131] and need not inquire elsewhere unless first put on inquiry by facts already known to him[132] or by pertinent facts discovered in the record.[133] An example of notice due to personal knowledge occurred in *Humboldt Building Association v. Ducker's Executrix*,[134] where the title searcher knew of construction in progress on the property. The construction resulted in liens which encumbered title. Since the attorney's knowledge of law should have informed him that an inquiry was required on the possibility of construction liens, liability was imposed.[135]

Other omissions have not received such lenient treatment by the courts. For instance, homestead interests should never be disregarded. The failure to report such an interest can cause the client to pursue a foreclosure which may ultimately prove to be invalid.[136] Nor should the searcher overlook the records of courts with jurisdiction over the property.[137] In particular, dockets must be checked for periods not covered by the judgment rolls.[138] Judgments must also be examined when re-

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[130] 152 N.W. at 355; *cf.* Cuthrell v. Camden Co., 254 N.C. 181, 184, 118 S.E.2d 601, 603 (1961) (no notice given when J. Frank Crowell indexed as J.L. Crowell). *But see* Stephenson v. Cone, 24 S.D. 460, 124 N.W. 439, 439-40 (1910) (must check Ed. J. or E.J. Borstad when running Edward J. Borstad).

[131] *See, e.g.*, Hughes v. State Highway Comm'n, 275 N.C. 121, 165 S.E.2d 321, 327 (1969) (since suit was not indexed, there was no notice; one is entitled to rely upon the record).

[132] *See* Thomas v. Schee, 80 Iowa 237, 43 N.W. 539, 540 (1890) (knowledge of pending suit); Humboldt Bldg. Ass'n v. Ducker's Ex'x, 111 Ky. 759, 64 S.W. 671, 673 (1901) (knowledge of construction that gave rise to liens); Scott v. Jordan, 55 Okla. 708, 155 P. 498, 500 (1916) (gross negligence to fail to report suit known to examiner).

[133] *See* Owen v. Neely, 471 S.W.2d 705, 707 (Ky. 1971) (discrepancies between deed and survey descriptions). *But see* Brown v. Title Ins. & Trust Co., 51 Cal. App. 65, 196 P. 114, 116-18 (1921) (no inquiry as to forgery from defective acknowledgment); Kauthan v. St. Louis Trust Co., 101 Mo. App. 1, 73 S.W. 334, 338 (1903) (no inquiry from facially valid judgment); Wolff v. Commercial Standard Ins. Co., 345 S.W.2d 565, 569 (Tex. Ct. App. 1961) (no inquiry as to forgery from defective acknowledgment).

[134] 111 Ky. 759, 64 S.W. 671 (1901).

[135] 64 S.W. at 673.

[136] Viotti v. Giomi, 41 Cal. Rptr. 345, 350-51 (1964) (attorney had requested title report in preparation to execution of a judgment).

[137] *See* Contini v. Western Title Ins. Co., 40 Cal. App. 2d 536, 544-47, 115 Cal. Rptr. 257, 261-64 (1974) (lis pendens notice omitted); Billick v. Davenport, 164 Iowa 105, 145 N.W. 470, 472 (1914) (federal judgments omitted); Hamilton v. Binger, 162 Kan. 415, 176 P.2d 553, 557-60 (1947) (certain probate records omitted).

[138] Pinkston v. Arrington, 98 Ala. 489, 13 So. 561, 562-63 (1893) (clerk not yet required to record judgments; examiner failed to check dockets). *But cf.* Herrington v. Heidelberg, 244 Miss. 364, 368-69, 141 So. 2d 717, 719-20 (1962) (no notice given by unenrolled judgment).

ferred to in the record as the basis for other documents in the chain of title. In *Byrnes v. Sparrow*,[139] a check of a judgment would have revealed that the plaintiff foreclosed on the wrong property and, consequently, was not vested with title.[140]

In general, a reference in one document of record to another requires that the searcher examine both to determine their true nature and relationship. Thus in *Wacek v. Frink*,[141] the Minnesota Supreme Court found liability when the title searcher relied upon a notation of satisfaction in the margin of a mortgage, rather than checking for the record of the actual instrument of satisfaction, which was nonexistent.[142] The courts have also looked with contempt on the failure to use an available index to locate matters of record. In *Crook v. Chilvers*,[143] the Nebraska Supreme Court rejected the examiner's reliance on the tract index on the theory that several indices were provided to facilitate title examination and could not be ignored in the search.[144] Therefore, it may be generally stated that the courts have been willing to limit title searches to matters of record within the chain of title,[145] but have nevertheless strictly required the fullest exploration of the record[146] within those limits.

B. The Failure to Find

Having undertaken the duty to make a search, the title examiner

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[139] 18 A.D. 1, 45 N.Y.S. 479 (1897).

[140] 45 N.Y.S. at 483-84; *cf.* Boone v. Sparrow, 235 N.C. 396, 70 S.E.2d 204, 210 (1952) (reliance on recitals in foreclosure for evidence of judgment).

[141] 51 Minn. 282, 43 N.W. 633 (1892).

[142] 53 N.W. at 634.

[143] 49 Neb. 684, 157 N.W. 617 (1916).

[144] 157 N.W. at 619-20; *see* Corcoran v. Abstract & Title Co., 217 Md. 633, 143 A.2d 808, 809-10 (1958) (mistake in grantee index could have been corrected by reference to grantor index); *cf.* Clarke v. Reed, 122 So. 2d 344, 349 (La. Ct. of App. 1960) (indexing unnecessary for notice); Murdock Acceptance Corp. v. Woodham, 208 So. 2d 56, 58 (Miss. 1968) (notice given by improperly indexed chattel mortgage); Bank of Lexington v. Cooper, 115 Miss. 782, 791-98, 76 So. 659, 661-63 (1917) (grantee need not ensure proper recording); Mangold v. Barlow, 61 Miss. 593, 596-99 (1883) (adopting minority view; ensuring accurate recording too great a burden on grantee). *But cf.* Plaza Corp. v. Allan Tractor Co., 219 Md. 570, 151 A.2d 170, 176-78 (1959) (proper indexing required as only evidence of title other than original documents); Cuthrell v. Camden Co., 254 N.C. 181, 184, 118 S.E.2d 601, 602-03 (1961) (indexing required by statute is sufficient if adequate to place examiner on inquiry); Hanson v. Zoller, 187 N.W.2d 47, 55-57 (N.D. 1971) (indexing required; grantor-grantee index impractical; reliance on tract index approved); Rising v. Dickinson, 18 N.D. 478, 121 N.W. 616, 617-18 (1909) (clerk liable for failure to index properly; reliance on tract index not contributory negligence).

[145] *See, e.g.*, Dodd v. Williams, 3 Mo. App. 278, 283-90 (1877) (allowing examiner to exclude search of matters outside chain of title).

[146] *See* Crook v. Chilvers, 99 Neb. 684, 157 N.W. 617, 619-20 (1916) (different indices provided to increase ability to trace title).

must then discover all items of record properly within the scope of the search. On first impression, a failure to find would appear to result from a lack of diligence[147] in searching the record. Where proper diligence has not been exercised, the examiner has the burden of proving some excuse[148] or defense[149] for his failure to find. Parenthetically, the promise by the attorney to provide perfect title or a lien of certain priority adds little to the client's cause,[150] since liability is readily established, and damages and defenses become the decisive questions.

Where violation of the "care" requirement is disputed, reference must be made to the rules of the search suggested by the preceding discussion. Once the chain of title is traced through the official indices,[151] a check must be made of all records of interests affecting title for each party in the chain.[152] Parties must be traced through names uncovered in the record as well as through those supplied by the client.[153] Practically, the search for each party must be limited to records for the period during which that party held title as shown by the chain of title or by other facts known to the searcher.[154] Nevertheless, other records must be located and examined if referenced to within another record.[155] Moreover, actual knowledge or discovery in the records of facts, sufficient to put a reasonable prudent person on inquiry, charges the title searcher with constructive knowledge of what may be found through a reasonable investigation of the facts.[156]

Applying these rules, the courts have encountered several examples

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[147] See notes 65 through 80 and accompanying text *supra*.

[148] *See* Hughes v. State Highway Comm'n, 275 N.C. 121, 165 S.E.2d 321, 327 (1969) (excused because judgment not indexed); Turk v. Benson, 30 N.D. 200, 152 N.W. 354, 355 (1915) (excused because judgment indexed under wrong name); *cf.* Pinkston v. Arrington, 98 Ala. 489, 13 So. 561, 562-63 (1893) (failure to search unreasonable as a matter of law, but jury might still find excuse).

[149] *See, e.g.*, Gilman v. Hovey & Buchanan, 26 Mo. 280, 290 (1858) (doubt as to effect of confessed judgment); Thorne v. Johnson, 483 S.W.2d 658, 663 (Mo. Ct. App. 1972) (constructive notice to client deemed an "absurd" defense); Bayerl v. Smith, 117 N.J.L. 412, 189 A. 93, 94-95 (1937) (contributory negligence); Southern Title Guar. Co. v. Prendergast, 494 S.W.2d 154, 158 (Tex. 1973) (quitclaim obtained to cure defect); Guarantee Abstract Co. v. Denman, 209 S.W.2d 213, 214-15 (Tex. Ct. App. 1948) (exculpatory clauses); Katzenberger v. Bryan, 206 Va. 78, 85-86, 141 S.E.2d 671, 676-77 (1965) (satisfaction and accord between grantor and client).

[150] See notes 25 through 28 and accompanying text *supra*.

[151] See notes 122 through 126 and accompanying text *supra*.

[152] *See, e.g.*, Joseph v. Greater New Guide Baptist Church, Inc., 194 So. 2d 127, 129-30 (La. Ct. of App. 1966) (deed did not convey interest of heir mentioned as grantor where heir did not in fact join in deed).

[153] See notes 129 & 130 and accompanying text *supra*.

[154] See notes 122 through 126 and accompanying text *supra*.

[155] See notes 138 through 141 and accompanying text *supra*.

[156] See notes 131 through 135 and accompanying text *supra*.

of a failure to find prior interests.[157] It is difficult, however, to determine from the summary treatment given liability in such cases[158] whether any other failing lay behind the failure to find.[159] Furthermore, the analytical distinctions between the failure to search and the failure to find begin to blur in practice as they both take place in the discovery of the records. Thus, as a practical matter, the many failure-to-find cases contribute little to the guidance of the search.

C. *Errors in Interpretation*

In contrast with the failure to find errors, those cases that focus on errors in interpretation provide more definite guidelines to aid a title searcher. The clearest and most important requirement of this category is the rule that the attorney must apply the settled rules of law of his jurisdiction.[160] No liability arises, however, when a rule that is relied upon in the search is subsequently overturned.[161] Nor will liability be created for mere errors in judgment[162] or for judgments made in the gray areas of the law.[163]

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[157] *See* Hinckley v. Krug, 4 Cal. Unrep. 208, 34 P. 118, 119 (1893) (tax lien); Viotti v. Giomi, 41 Cal. Rptr. 345, 350-51 (Ct. App. 1964) (homestead declaration); Cocoran v. Abstract & Title Co., 217 Md. 633, 143 A.2d 808, 809 (1958) (easement); Gilman v. Hovey & Buchanan, 26 Mo. 280, 290 (1858) (judgment); Hughes v. State Highway Comm'n, 275 N.C. 121, 165 S.E.2d 321, 327 (1969) (right of way); Katzenberger v. Bryan, 206 Va. 78, 85-86, 141 S.E.2d 671, 676-77 (1965) (conveyance of part of property).

[158] *See, e.g.*, Hill v. Cloud, 48 Ga. App. 506, 173 S.E. 190, 191 (1934) (syllabus opinion); Lilly v. Boyd, 72 Ga. 83, 84 (1883) (facts limited to certification of title and later eviction of client).

[159] In Byrnes v. Palmer, 18 A.D. 1, 45 N.Y.S. 479 (1897), the court openly chose a ruling based on a failure to find due to misreading, rather than a ruling based on misinterpretation. 45 N.Y.S. at 283-84.

[160] *See* Dodd v. Williams, 3 Mo. App. 278, 281 (1877) (must know law well enough to recognize lien); Clinton v. Miller, 124 Mont. 463, 483, 226 P.2d 487, 498 (1951) (must know statutes, decisions, and settled rules of conveyancing); Trimboli v. Kinkel, 226 N.Y. 147, 123 N.E. 205, 206 (1919) (must know settled law known to conveyancers); *cf.* Citizen's Loan, Fund & Sav. Ass'n v. Friedley, 123 Ind. 143, 23 N.E. 1075, 1076 (1890) (reliance on precedent justified); Humboldt Bldg. Ass'n v. Ducker's Ex'x, 111 Ky. 759, 64 S.W. 671, 673 (1901) (bar's uncertainty as to particular law was question of fact).

[161] *See* Citizen's Loan, Fund & Sav. Ass'n v. Friedley, 123 Ind. 143, 23 N.E. 1075, 1076 (1890) (reliance on precedent of state's highest court justified); *cf.* Humboldt Bldg. Ass'n v. Ducker's Ex'x, 111 Ky. 759, 64 S.W. 671, 673 (1901) (bar's uncertainty as to particular law was question of fact).

[162] Hopper v. Gurtman, 17 N.J. Misc. 287, 8 A.2d 376, 380 (1939) (no liability where examiner cited defect and opined in good faith that title still good); *cf.* Watson v. Muirhead, 57 Pa. 161, 168 (1868) (conveyancer justifiably relied upon attorney's opinion that title was good despite judgment of record). *But see* Trimboli v. Kinkel, 226 N.Y. 147, 123 N.E. 205 (1919) (where attorney was informed of defect after title search, liability ensued for insisting title was good and failing to gather evidence of adverse possession).

[163] *See* Citizen's Loan, Fund & Sav. Ass'n v. Friedley, 123 Ind. 143, 23 N.E. 1075, 1075-76 (1890) (must use reasonable diligence to keep informed, but no liability for failure

Liability does attach for errors made when no reasonable doubt exists about the rights of parties or the requirements of title.[164] For example, liability could be based upon a failure to appreciate how inchoate rights are affected by certain legal acts, such as failing to recognize the effect of foreclosure on homestead interest, which leads the client to believe that a foreclosure could secure good title.[165] Liability could also be founded upon a misreading of a document that results in a misunderstanding about which property is affected[166] or how it is actually affected.[167] An example of this problem occurred in *Collins v. Slocum*,[168] in which the examiner overlooked the fact that an easement that once applied to a large tract of land had continued to apply to those parcels severed from the main tract.[169] Likewise, an attorney may incur liability for failing to comprehend the import of legal actions standing behind conveyances,[170] and he is additionally responsible for knowing what parties and what formalities are necessary to pass good title. Thus, in *Joseph v. Greater New Guide Baptist Church, Inc.*,[171] the Louisiana Court of Appeals found liability based on the attorney's failure to note the omission of an heir who was a necessary signatory to a deed.[172]

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to anticipate decision in doubtful area of law); Humboldt Bldg. Ass'n v. Ducker's Ex'x, 111 Ky. 759, 64 S.W. 671, 673 (1901) (jury must determine that doubt as to state of law actually existed among bar); *cf.* Wlodarek v. Thrift, 178 Md. 453, 13 A.2d 774, 779 (1940) (reasonable doubt as to unmarketability defeats liability).

[164] In Wlodarek v. Thrift, 178 Md. 453, 13 A.2d 774 (1940), the court ruled that liability depended upon a showing that (1) title was not good, (2) the defect should have been discovered through the exercise of reasonable care and diligence, and (3) the plaintiff suffered more than mere nominal damages. 13 A.2d at 779.

[165] Viotti v. Giomi, 41 Cal. Rptr. 345, 350-51 (Ct. App. 1969); *cf.* Joseph v. Greater New Guide Baptist Church, Inc., 194 So. 2d 127, 129-30 (La. Ct. of App. 1966) (title certified despite absence of one heir as grantor in chain of title). *But see* Hooper v. Gurtman, 17 N.J. Misc. 289, 8 A.2d 376, 380 (1939) (examiner noted curtesy rights and gave opinion that they had been divested—no liability).

[166] *See* Byrnes v. Palmer, 18 A.D. 1, 45 N.Y.S. 479, 483 (1897) (title to land sold at foreclosure sale incorrectly identified portion of lot as having been released from mortgage); DuPratt v. Black Hills Land & Abstract Co., 81 S.D. 637, 140 N.W.2d 386, 387-89 (1966) (client attempted to convey land which abstractor negligently failed to except from abstract of title). *But cf.* Ehlers v. Pound, 176 Neb. 673, 126 N.W.2d 893, 894-95 (1964) (where plaintiff knew of mortgage on property he was purchasing, failure of abstractor to find lien was not the proximate cause of any damage to plaintiff).

[167] *See* Equitable Bldg. & Loan Ass'n v. Bank of Commerce & Trust Co., 118 Tenn. 678, 102 S.W. 901, 903 (1907) (life estate reported as a fee estate).

[168] 317 So. 2d 672 (La. Ct. of App.), *cert. denied*, 321 So. 2d 362, 363, 364 (La. 1975).

[169] 317 So. 2d at 679-80.

[170] *See* Trimboli v. Kinkel, 226 N.Y. 147, 123 N.E. 205, 205 (1919) (executor given power of sale only, not power of exchange); Byrnes v. Palmer, 18 A.D. 1, 45 N.Y.S. 479, 483-84 (1897) (foreclosure invalid); Boone v. Sparrow, 235 N.C. 396, 70 S.E.2d 204, 210 (1952) (judgment behind foreclosure was defective).

[171] 194 So. 2d 127 (La. Ct. of App. 1966).

[172] *Id.* at 129-30; *cf.* Palmer v. Nissen, 256 F. Supp. 497, 499-501 (D. Me. 1966)

In sum, the attorney must be able to recognize defects,[173] determine if the defects are material,[174] and be cognizant of whether further inquiry is required.[175] Where doubt exists about what the record actually reveals, the attorney must go as far as the settled rules of law will carry him in resolving any doubts with regard to title,[176] and where his doubts are unresolvable, they must be reported to the client to apprise him of his risk.[177]

D. The Failure to Report

In one sense, all errors and omissions manifest themselves in a false report to the client.[178] Nevertheless, it is helpful to examine the reporting phase separately in order to emphasize the advisory function of the title search.[179] The cases indicate that title searchers have found, but failed to report, a wide variety of defects in a title.[180] A common mistake is the

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(reliance on recitals in prior deeds to establish death of prior owner and to assure that all heirs joined in conveyance to plaintiff); Mumford v. Staton, Whaley & Price, 254 Md. 697, 255 A.2d 359, 363 (1969) (same); Schade v. Gehner, 133 Mo. 252, 34 S.W. 576, 576-77 (1896) (cotenant not joined in partition suit).

[173] *See, e.g.*, Dodd v. Williams, 3 Mo. App. 278, 281 (1877) (must know what is a lien in the locality).

[174] *See, e.g.*, Clinton v. Miller, 124 Mont. 463, 483, 226 P.2d 487, 498 (1951) (second attorney's opinion induced client to seek to cure immaterial defects).

[175] *See, e.g.*, Trimboli v. Kinkel, 226 N.Y. 147, 123 N.E. 205, 206 (1919) (attorney on notice of defect should have sought evidence of title through adverse possession).

[176] *See* Owen v. Neely, 471 S.W.2d 705, 708 (Ky. 1971) (liability for failure to investigate or report if facts sufficient to put on inquiry); *cf.* Gilman v. Hovey & Buchanan, 26 Mo. 280, 290 (1858) (doubtful validity of judgment no defense when not reported to client); Sunset Holding Corp. v. Home Title Ins. Co., 172 Misc. 759, 16 N.Y.S.2d 273, 275-76 (Sup. Ct. 1939) (client not told of discrepancy between sales contract and deed).

[177] *See* Gleason v. Title Guarantee Co., 317 F.2d 56, 60 (5th Cir. 1963) (absent knowledge or constructive knowledge of risk, client should not bear the loss); Gilman v. Hovey & Buchanan, 26 Mo. 280, 290 (1858) (without opportunity to accept risk, client should not bear loss).

[178] *See* Lilly v. Boyd, 72 Ga. 83, 84 (1883) (cause arises on delivery of false report, not on occurrence of damages); *cf.* Gardner v. Wood, 37 Misc. 93, 74 N.Y.S. 750, 751 (Sup. Ct. 1902) (client did not have to wait for risk to ripen into loss to sue); Southern Title Guar. Co. v. Prendergast, 494 S.W.2d 154, 156 (Tex. 1973) (failure of title sufficient without ejectment to sustain cause of action).

[179] The examiner must give advice that is both accurate and complete. Glynn v. Title Guarantee & Trust Co., 132 A.D. 859, 117 N.Y.S. 424, 427 (1909).

[180] *See, e.g.*, Combs v. Eubank, 28 F.2d 459, 462 (8th Cir. 1928) (tax lien); Phoenix Title & Trust Co. v. Continental Oil Co., 43 Ariz. 219, 29 P.2d 1065, 1068 (1934) (building restrictions not reported in full); Merrill v. Fremont Abstract Co., 39 Idaho 238, 227 P. 34, 35 (1924) (mortgage); Auten v. Guaranty Abstract & Title Co., 75 Ill. App. 2d 121, 220 N.E.2d 508, 510 (1966) (judgment lien; records not impeached by parol evidence); Hewitt v. Millis, 159 Ind. App. 684, 309 N.E.2d 162, 164-66 (1974) (annexation and zoning ordinances); Canatella v. Davis, 264 Md. 190, 286 A.2d 122, 124, 129 (1972) (deed did not conform to sales contract; merger does not protect examiner); Home Fed. Sav. & Loan

failure to report matters known to the searcher independently of the record.[181] In an Iowa case, *Thomas v. Schee,*[182] the examiner, who was also the grantor, failed to report a suit pending against himself to quiet title in another party. Although this misrepresentation alone would be enough to establish liability, the attorney also reported an instrument as a deed conveying title when, in fact, it was not. This deliberate misrepresentation approached fraud,[183] but misrepresentation need not amount to fraud in order to establish liability. In *Glyn v. Title Guarantee & Trust Co.,*[184] a New York court based liability simply upon the vagueness of the title report from the attorney to the client. Discrepancies revealed by a survey were referred to in the report merely as "some variations."[185]

The inadequacy of the report to inform the client clearly violates the duty of the attorney to advise when he is aware of the client's special needs or requirements. Thus in *Gardner v. Wood,*[186] the New York court held that the client's necessity for taking a first lien was sufficient to

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Ass'n v. Spence, 259 Md. 575, 270 A.2d 820, 822 (1970) (construction liens); Dorr v. Massachusetts Title Ins. Co., 238 Mass. 490, 131 N.E. 191, 192 (1921) (right of way); Johnson v. Crisler, 156 Miss. 266, 268-69, 125 So. 724, 724-26 (1930) (special assessment for street paving); Anderson v. Boone County Abstract Co., 418 S.W.2d 123, 124 (Mo. 1967) (restrictive covenant preventing commercial development); Marcell v. Midland Title Guar. & Abstract Co., 112 Neb. 420, 199 N.W. 731, 732 (1924) (attachment lien); Broser v. Royal Abstract Corp., 46 Misc. 2d 717, 260 N.Y.S.2d 487, 489-90 (Civ. Ct. 1965), *aff'd in part,* 49 Misc. 2d 882, 268 N.Y.S.2d 594, 595 (Sup. Ct. 1966) (per curiam) (junior judgment; client had taken deed in lieu of foreclosure); Udell v. City Title Ins. Co., 12 A.D.2d 78, 208 N.Y.S.2d 504, 507-08 (1960) (party wall); Ninth Ave. & Forty-Second St. Corp. v. Zimmerman, 217 A.D. 498, 217 N.Y.S. 123, 124 (1926) (contingent interest).

[181] *See* Thomas v. Schee, 80 Iowa 237, 45 N.W. 539, 540-41 (1890) (grantor also examiner; failed to report suit pending against himself); Humboldt Bldg. Ass'n Co. v. Ducker's Ex'x, 111 Ky. 759, 64 S.W. 671, 672-73 (1909) (materialmen's liens); *cf.* Jarchow v. Transamerica Title Ins. Co., 48 Cal. App. 3d 917, 938-39, 122 Cal. Rptr. 470, 485-86 (1975) (easement found but not reported); Scott v. Jordan, 55 Okla. 708, 155 P. 498, 499 (1916) (suit found but not reported).

[182] 80 Iowa 237, 45 N.W. 539 (1890).

[183] 45 N.W. at 540-41; *cf.* Scott v. Jordan, 55 Okla. 708, 155 P. 498, 500 (1916) (gross negligence to find suit and fail to report it). Negligent misrepresentations form an equally firm basis for finding liability. *See, e.g.,* Lee Lumber Co. v. Hetherwick Title Co., 160 La. 978, 107 So. 772, 773-74 (1926) (incorrect expiration date shown for timber leases); DuPratt v. Black Hills Land & Abstract Co., 81 S.D. 637, 140 N.W.2d 386, 387-89 (1966) (misdescription incorporated in attempted conveyance); Equitable Bldg. & Loan Ass'n v. Bank of Commerce & Trust Co., 118 Tenn. 678, 102 S.W. 901, 903 (1907) (life estate represented as fee estate); *cf.* J.H. Trisdale, Inc. v. Shasta County Title Co., 146 Cal. App. 2d 831, 839, 304 P.2d 832, 837 (1956) (easement attributed to wrong party); Ehlers v. Pound, 176 Neb. 673, 126 N.W.2d 893, 894-95 (1965) (lien incorrectly shown on property but abstractor's error was not proximate cause of damages).

[184] 132 A.D. 859, 117 N.Y.S. 424 (1909).

[185] 117 N.Y.S. at 427.

[186] 37 Misc. 93, 74 N.Y.S. 750 (Sup. Ct. 1902).

put the attorney in breach for failing to report prior liens, even though the financial loss to the client remained uncertain.[187]

Nevertheless, the attorney is not required to foresee every possible injury to his client. Accordingly, the courts have generally not required a report of what may be termed future liens or liens on adjacent property,[188] despite actual injury to the client. Thus, the title examiner need not advise his client of every conceivable risk, but he must inform the client of all *material* defects in the title which he has been hired to search.[189] By identifying a defect as material, the attorney informs the client of his risk in taking title. Failure to identify a material defect exposes both the client and the attorney to a significant risk of loss.

VII. Defenses

When a risk evolves into loss, the client or his successors in title may attempt to shift the risk of loss to the title searcher.[190] To avoid this shift of loss, attorneys have employed a host of defenses with varying degrees of success. Some defenses, such as lack of privity or the statute of limitations, have been dependable shields against liability,[191] while others, such as contributory negligence,[192] have met with little success. Some defenses, such as constructive notice, have been classified as bordering on absurdity.[193]

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[187] 74 N.Y.S. at 751.

[188] In Little Rock Abstract Co. v. Keaton, 239 Ark. 944, 395 S.W.2d 327 (1965), the abstractor's attorney found that the property had been released from an easement affecting the adjacent property. No report of the easement on the adjacent property was made. When the client had the adjacent street paved, the easement was asserted and required to be honored. The court excused the abstractor from reporting on adjacent property. 395 S.W.2d at 329.

See notes 128 & 129 and accompanying text *supra*.

[189] *See, e.g.*, Palmer v. Nissen, 256 F. Supp. 497, 499, 501 (D. Me. 1966) (defects admitted but found immaterial); Brown v. Title Ins. & Trust Co., 51 Cal. App. 65, 196 P. 114, 116-17 (1921) (not error to certify title despite defective acknowledgement in conveyance); Manville v. Le Flore-McCasland Abstract & Realty Co., 65 Okla. 12, 162 P. 682, 683 (1917) (no liability for omission of invalid lien).

[190] A suit seeks to shift the burden of loss to the party that committed the harmful conduct. Sunset Holding Corp. v. Home Title Ins. Co., 172 Misc. 759, 16 N.Y.S.2d 273, 275 (Sup. Ct. 1939).

[191] *See, e.g.*, Mumford v. Staton, Whaley & Price, 254 Md. 697, 255 A.2d 359, 363-67 (1969) (adopting discovery rule but preserving privity requirement); Cecala v. Title Guarantee Co., 45 Misc. 2d 986, 258 N.Y.S.2d 464, 468 (Sup. Ct. 1965) (rejected discovery rule).

[192] *See, e.g.*, Broser v. Royal Abstract Corp., 46 Misc. 2d 717, 260 N.Y.S.2d 487, 489-90 (Cir. Ct. 1965) (acceptance of deed in lieu of foreclosure without exacting abstract of title is not contributory negligence), *rev'd in part on other grounds*, 49 Misc. 2d 882, 268 N.Y.S.2d 594, 595 (Sup. Ct. 1966) (per curiam).

[193] Thorne v. Johnson, 483 S.W.2d 658, 663 (Mo. Ct. App. 1972) (absurd to require layman to make independent investigation of a professional abstractor's work).

A. Denying Duty

Perhaps the attorney's logical first line of defense is to deny that any duty is owed to the injured party. The Pennsylvania Supreme Court in *Lawall v. Groman*[194] encountered an attorney's denial that a contract existed between him and the injured party. While recognizing that nonfeasance would not create liability without duty, the court stated that a title search voluntarily undertaken would still produce liability for misfeasance in the search.[195]

A second form of denying duty arises from a defense of lack of privity. Although conceding that a contract existed, the attorney may argue under the rule of privity that he owes a duty only to the parties of the contract. Thus, for those not in privity, the fact that no duty was owed to them means no recovery. Originally, privity was an absolute requirement for a finding of liability;[196] however, the growing evidence of unconscionable results has led to an increasing judicial abandonment of the privity requirement. The harshness of the original rule of privity is illustrated by the Missouri case, *Schade v. Gehner,*[197] in which recovery was denied to the client's widow because of a lack of privity.[198]

The modern trend attempts to avoid such harsh results by extending recovery to those parties whose reliance is foreseen by the title searcher.[199] Various decisions have interpreted the concept of foreseeable

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[194] 180 Pa. 532, 37 A. 98 (1897).

[195] *Id.* at 540, 37 A. at 99; *see* Decatur Land, Loan & Abstract Co. v. Rutland, 185 S.W. 1064, 1066-67 (Tex. Ct. App. 1916) (undertaking correction for party not in privity may create liability). *But see* Cambridge Acceptance Corp. v. American Nat'l Motor Inns, Inc., 96 N.J. Super. 183, 232 A.2d 692, 707-08 (Law Div. 1967) (no liability based on letter affirming title certification absent consideration), *aff'd*, 102 N.J. Super. 435, 246 A.2d 138 (App. Div. 1968) (per curiam).

[196] *See, e.g.*, Sandler v. New Jersey Realty Title Ins. Co., 66 N.J. Super. 597, 169 A.2d 735, 740-41 (Law Div. 1961) (seller's attorney requested examination; only seller or his agent could sue); Goodman v. Title Guarantee & Trust Co., 11 A.D. 2d 1003, 206 N.Y.S. 2d 32, 33-34 (1960) (per curiam) (fraud necessary to circumvent privity requirement); Equitable Bldg. & Loan Ass'n v. Bank of Commerce & Trust Co., 118 Tenn. 678, 102 S.W. 901, 904 (1907) (no liability without privity).

[197] 133 Mo. 252, 34 S.W. 576 (1896).

[198] 34 S.W. at 576-77; *see* Hawkins v. Oakland Title Ins. & Guar. Co., 65 Cal. App. 2d 116, 331 P.2d 742, 749-50 (1958) (privity required despite custom of keeping abstract to show subsequent purchasers); *cf.* Long v. American Sav. & Loan Ass'n, 151 A.2d 770, 772-73 (D.C. 1959) (borrower's action for negligent misrepresentation not allowed where title certificate was issued to lender and no representations were made to borrower); Capital Bank & Trust Co. v. Core, 343 So. 2d 284, 287-88 (La. Ct. of App. 1977) (attempting to defend on privity despite total failure to search).

[199] *See* Hawkins v. Oakland Title Ins. & Guar. Co., 165 Cal. App. 2d 116, 331 P.2d 742, 749-50 (1958) (exception to privity requirement possible where reliance foreseen); Chun v. Park, 51 Haw. 462, 501, 462 P.2d 905, 907 (1969) (title company which prepared certificate at seller's request held liable to buyer for negligence where company informed of identities of buyer and lending institution); Capital Bank & Trust Co. v. Core, 343 So.

reliance and, in *Capital Bank & Trust Co. v. Core,*[200] the Louisiana Court of Appeals went so far as to suggest that actual privity existed between the attorney and a third party for whose benefit the title search was done.[201] Even more significantly, in Mississippi the legislature has gone a step further by abrogating the rule entirely in cases where economic loss is shown to result from negligence.[202]

B. Denying the Breach of Duty

If it is not contested that a duty was owed to the injured party, as an alternative defense the attorney may deny that any breach occurred. This defense may take the form of proving that no material defect was omitted and that title was in fact good and merchantable. In a Maine decision, *Palmer v. Nissen,*[203] the attorney succeeded in showing that the absence of records of a probate proceeding did not constitute a material flaw in the record since adequate information was supplied according to local standards by way of recitals in the chain of conveyances.[204]

2d 284, 288 (La. Ct. of App. 1977) (applying abstractor cases to attorney; finding actual privity between lender and borrower's attorney); Williams v. Polgar, 391 Mich. 6, 215 N.W.2d 149, 150-51 (1974) (establishing tort of negligent misrepresentation for party whose reliance was reasonably foreseeable by abstractor); State v. Boone County Abstract Co., 432 S.W.2d 305, 308 (Mo. 1968) (no privity needed where reliance foreseen), *overruling in part,* Zwigardt v. Birdseye, 57 Mo. App. 462, 467 (1894) (privity required despite knowledge of reliance); *cf.* Chelsea Title & Guar. Co. v. Louis Briggs Constr., Inc., 315 So. 2d 229, 229-30 (Fla. Dist. Ct. App. 1975) (seller ordered abstract, but buyer paid for and received it, therefore, buyer in privity); Doonis v. Mutual Title Co., 196 A.2d 480, 482 (D.C. 1964) (buyer and seller shared expenses of examination; both in privity). *But see* Mumford v. Staton, Whaley & Price, 254 Md. 697, 255 A.2d 359, 361-67 (1969) (privity retained but discovery rule adopted); I.F.C. Collateral Corp. v. Commercial Units, Inc., 51 Wis. 2d 41, 186 N.W.2d 214, 220 (1971) (refusing recovery to unsecured creditors because they had "no interest" in property at the time of the search).

[200] 343 So. 2d 284 (La. Ct. of App. 1977).

[201] *Id.* at 287-88.

[202] MISS. CODE ANN. § 11-7-20 (Supp. 1977).

[203] 256 F. Supp. 497 (D. Me. 1966).

[204] *Id.* at 500-01; *cf.* Brown v. Title Ins. & Trust Co., 51 Cal. App. 65, 196 P. 114, 116-18 (1921) (defective acknowledgement did not disqualify deed from chain of title); Manville v. Le Flore-McCasland Abstract & Realty Co., 65 Okla. 12, 162 P. 682, 683 (1917) (invalid lien omitted); Clinton v. Miller, 124 Mont. 463, 483, 226 P.2d 487, 498 (1951) (correction deed cured defect); Hopper v. Gurtman, 17 N.J. Misc. 289, 8 A.2d 376, 380 (1939) (without express agreement, attorney is not an insurer). *But see* Gilman v. Hovey & Buchanan, 26 Mo. 280, 290 (1858) (if judgment omitted, no defense that its validity was in doubt); *cf.* Auten v. Guaranty Abstract & Title Co., 75 Ill. App. 2d 121, 220 N.E.2d 508, 510 (1966) (court records not to be challenged by parol testimony). *See generally* Wlodarek v. Thrift, 178 Md. 453, 13 A.2d 774, 779 (1940) (recovery depends on showing title not good); Ninth Ave. & Forty-second St. Corp. v. Zimmerman, 217 A.D. 498, 217 N.Y.S. 123, 126 (1926) (fact of resale does not prove merchantability); Southern Title Guar. Co. v. Prendergast, 494 S.W.2d 154, 156-57 (Tex. 1973) (examiner must prove good title after prima facie showing of defect).

Another form of this defense is the contention that the search undertaken did not require a search for the kind of defect alleged. In *Douglas v. Title Trust Co.*,[205] the Washington Supreme Court concluded that a contract to update an abstract did not imply a duty to discover defects omitted in the original search.[206] Similarly, the Tenth Circuit in *National Life & Accident Insurance Co. v. Parkinson*[207] authorized the local practice of excluding from the search defects created by suits adjusting the tax records.[208] From this line of cases, it may be stated that the exclusion of particular defects may be based on either the contract or on local customs. If a defect can be reasonably excluded, then title would be good to the extent shown by a reasonable search. In effect, no breach occurred since the searcher had no duty to discover the particular defect in title.

C. *Denial of Damages*

Although admitting that a breach of duty occurred, the attorney may still claim that no harm resulted. An effective approach for this defense would be to show that no reliance was actually placed on the search. For example, in *Maggio v. Abstract Title & Mortgage Corp.*,[209] the client had knowledge of the title defect independent of the title search. The New York court held that he assumed the risk by taking title while possessing personal knowledge of the defect.[210] Similarly, the

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[205] 80 Wash. 71, 141 P. 177 (1914).

[206] 141 P. at 177-78; *cf.* Clinton v. Miller, 124 Mont. 463, 483, 226 P.2d 487, 498 (1951) (implying search may be limited to abstract); Hadley Realty Corp. v. Lawyers Title Corp., 37 N.Y.S.2d 658, 661 (1942) (acceptance validates limitations of search). *But see* Arnold v. Barner, 100 Kan. 36, 163 P. 805, 806 (1917) (liability for prior search if reissued in update); Owen v. Neely, 471 S.W.2d 705, 707-08 (Ky. 1971) (exception for matters shown by accurate survey is ineffective when examiner is aware of discrepancies); Corcoran v. Abstract & Title Co., 217 Md. 633, 143 A.2d 808, 809-10 (1958) (exception for matters not properly shown of record or not properly indexed is ineffective where only one index was used); *cf.* Dorr v. Massachusetts Title Ins. Co., 238 Mass. 490, 131 N.E. 191, 192 (1921) (insurer offered client insurance with exclusions for defects discovered but not reported to client).

[207] 136 F.2d 506 (10th Cir. 1943).

[208] *Id.* at 512; *cf.* Palmer v. Nissen, 256 F. Supp. 497, 500-01 (D. Me. 1966) (practice of reliance on recitals); Little Rock Abstract Co. v. Keaton, 239 Ark. 944, 395 S.W.2d 327, 329 (1965) (practice of omitting easements on adjacent property). *But see* Morin v. Divide County Abstract Co., 48 N.D. 214, 183 N.W. 1006, 1007-08 (1921) (practice of keeping own records of title).

[209] 277 A.D. 940, 98 N.Y.S.2d 1011 (1950).

[210] 98 N.Y.S.2d at 1012-13; *see* Randall v. Paine-Nichols Abstract Co., 205 Okla. 430, 238 P.2d 319-20 (1951) (seller's representations not based on search); *cf.* Roberts v. Leon Loan & Abstract Co., 63 Iowa 76, 18 N.W. 702, 704-05 (1884) (no recovery if defect discovered in time to prevent injury), *aff'd*, 69 Iowa 673, 29 N.W. 776 (1886). *See also* Bechovsky v. Burton Abstract & Title Co., 208 Mich. 224, 175 N.W. 235, 237 (after deed

client may be held to assume the risk when he obligates himself to take title before ordering a title search. In *Doonis v. Mutual Title Co.*,[211] the District of Columbia court found that the client was bound to accept easements not rendering title unmerchantable, and could not recover for the attorney's failure to report the easements when their presence was shown on a plat actually given to him.[212] Where he is bound to take title regardless of the outcome of the title report, the client would be unable to avoid the risk of defective title even if he were fully informed by the attorney. In essence, he has elected to forego reliance on the attorney's expert advice, thereby removing potential liability for the loss from the hands of the attorney.

D. Limiting Liability

If injury does result from a breach of duty, the attorney may still be protected by a limitation of or an absolute bar to liability. One available mechanism for this type of protection may be to have the contract itself make liability conditional upon payment of fees.[213] The examiner might also be allowed to set a *reasonable* limit on the amount of liability that may be incurred. In *Broser v. Royal Abstract Corp.*,[214] a New York court upheld such a reasonable limit in a tort case.[215]

Another potential limit on liability might be based on contributory negligence of the client, but to date attorneys have had no success with this defense in title search cases. In *Broser*, for example, the client had accepted a deed in lieu of foreclosure and then learned of a lien junior to his that was not reported. Although this action may have arguably constituted negligence by the client, the court concluded that since he could have removed the threat of this junior lien if he had been fully informed, the client was entitled to recover despite his own contribution to the loss.[216]

In contrast to the judicial disregard for the contributory negligence

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accepted, statement cannot place client on notice so as to defeat liability for prior report), *aff'd*, 208 Mich. 224, 178 N.W. 238 (1920).

[211] 196 A.2d 480 (D.C. 1964).

[212] *Id.* at 482; *accord*, Kenerson v. Title Guar. & Trust. Co., 179 A.D. 898, 166 N.Y.S. 369, 370 (1917) (per curiam) (no loss caused by inaccurate report when client obligated to take title).

[213] Abstract & Title Guar. Co. v. Kigin, 21 Ala. App. 397, 108 So. 626, 628 (1926).

[214] 49 Misc. 2d 882, 268 N.Y.S.2d 594 (Sup. Ct. 1966) (per curiam).

[215] 268 N.Y.S. at 595. Exculpatory clauses have been strictly construed against the title examiner. *See, e.g.*, Owen v. Neely, 471 S.W.2d 705, 707-08 (Ky. 1971) (exclusion of matters shown by correct survey not upheld where examiner had knowledge of the discrepancies actually shown by a survey); Corcoran v. Abstract & Title Co., 217 Md. 633, 143 A.2d 808, 809-10 (1958) (exclusion of matters improperly indexed not upheld where a second index showed correct information).

[216] 268 N.Y.S.2d at 595.

argument, the statute of limitations has been a consistently dependable defense in title search cases. In *Johnson v. Crisler*,[217] the Mississippi Supreme Court avoided a discussion of liability altogether by viewing any cause of action as one in contract that had already been foreclosed by the running of the statute of limitations.[218] However, other courts have been less rigid in their approaches than Mississippi. Recognizing that the essence of the cause of action is the attorney's negligence,[219] numerous courts have held that the statute of limitations begins to run from the time the negligence is first discovered or should have been discovered.[220] This discovery rule is in accord with the principle that the client should not be required to check the work of his attorney. Under the discovery rule, the client's inherent inability to recognize title defects may result in a finding of liability many years after the injury occurred.[221]

The Mississippi rule evidences a desire to protect the attorney from the ever-increasing potential for liability, while the alternative position taken by other jurisdictions rationalizes that the title search is undertaken for the client's protection, and no arbitrary limits should be placed on the protection afforded him. In choosing who must bear the insecurity produced by a title search, the discovery rule places the burden on the party more able to protect himself—the attorney. It is the attorney who can best appreciate the risks created by a title search and best protect himself by using his legal expertise to shape his duty through the contract in an effort to avoid the risk of loss.[222]

E. Erosion of Defenses

With the erosion of the two major defenses, privity and statutes of limitations, the title searcher must depend more and more on establish-

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[217] 156 Miss. 266, 126 So. 724 (1930).

[218] *Id.* at 268-69, 125 So. at 724-25; *see* M.T. Reed Constr. Co. v. Jackson Plating Co., 222 So. 2d 838, 840 (Miss. 1969) (reaffirming *Johnson v. Crisler* in suit for architect's negligence). *But cf.* Hillock v. Idaho Title & Trust Co., 22 Idaho 440, 126 P. 612, 615 (1912) (justice is frustrated if the cause is barred before injury appears); Cecala v. Title Guarantee Co., 45 Misc. 2d 986, 258 N.Y.S.2d 464, 468-69 (Sup. Ct. 1965) (reissuance of report starts the statute anew).

[219] Mumford v. Staton, Whaley & Price, 254 Md. 697, 255 A.2d 359, 361-63 (1969).

[220] *E.g.*, Williams v. Polgar, 391 Mich. 6, 215 N.W.2d 149, 150-51 (1974); Family Sav. & Loan, Inc. v. Ciccarello, 207 S.E.2d 157, 160-62 (W. Va. 1974). *Contra*, St. Paul Fire & Marine Ins. v. Crittenden Abstract & Title Co., 255 Ark. 706, 502 S.W.2d 100, 102-04 (1973) (cause accrues on delivery of false abstract).

[221] *See* Hendrickson v. Sears, 365 Mass. 83, 310 N.E.2d 131, 135-36 (1974) (the client's need for long-term protection requires that liability develop only when negligence is discoverable); 9 SUFFOLK U. L. REV. 1448, 1456-57 (1975) (discussing accrual of liability over the years).

[222] See notes 16 through 32 and accompanying text *supra*.

ing the contractual limits regarding his search and his potential liability. Of course, a showing of good title is the simplest solution to the threat of liability,[223] but presumably the attorney has already made a reasonable effort at establishing marketable title. Moreover, the increasing emphasis on reliance suggests that an injury may prove actionable even though the loss of title in value may be minimal in objective terms. In *Jarchow v. Transamerica Title Insurance Co.*,[224] for instance, a title insurer neglected to report an easement and refused to defend title when the easement was asserted. Although the actual damages to title amounted to less than $200, the California court allowed damages for attorneys' fees and emotional distress in excess of $200,000.[225] This case illustrates that the attorney's potential for liability is far too great to rely on possible litigation to determine whether the practices exercised were reasonable. Consequently, the attorney must, for his own protection, inform the client of the full perimeters of the search.

VIII. Perimeters of the Reasonable Search

In deciding what charges a purchaser with record notice,[226] the Mississippi Supreme Court has given some indication of what may be classified as reasonable limits on a title search. First, a grantee is charged with notice of all conveyances previously recorded by his grantor, "if such deeds or conveyances in any way affect his title."[227] If this qualification is not to be ignored as surplusage, neither is it to be extolled as an exact statement of criteria. A literal reading of this qualification adds nothing to the guidance given because the determination that a matter affects title can be made only after it is found. Since determining what affects title is the very object of the title search, the qualification should not be read so broadly as to require the attorney to find all matters of record under the grantor's name. The better approach would be to require the examiner to search to the point where his grantor acquired title.[228] The grantor-grantee index must then be utilized to check for encumbrances in the grantor's name.[229] Second, a purchaser is charged

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[223] Wlodarek v. Thrift, 178 Md. 453, 13 A.2d 774, 774 (1940).

[224] 48 Cal. App. 3d 917, 122 Cal. Rptr. 470 (1975).

[225] *Id.* at 950, 122 Cal. Rptr. at 493.

[226] The Mississippi Supreme Court has provided virtually no guidance through title search cases. See notes 125, 126, 217 & 218 and accompanying text *supra*.

[227] *E.g.*, Burkett v. Peoples Bank, 225 Miss. 291, 299, 83 So. 2d 185, 188 (1955) (inquiry by discrepancy between recital and description). See note 122 *supra*.

[228] See notes 117 through 126 and accompanying text *supra*.

[229] See notes 143 & 144 and accompanying text *supra*. Because of better record duplicating processes, recording is less likely to be defective than indexing today, especially since Mississippi law requires the upkeep of the general index, but not the tract index. Miss. Code Ann. § 89-5-25 (1972).

with notice of conveyances within his chain of title.[230] In order to check this, the searcher may establish the chain of title through the tract index[231] and then read each document to confirm the chain. Finally, a purchaser must investigate facts found in the record which warrant further inquiry. In *Owen v. Neely*,[232] the Kentucky Supreme Court stated that a title searcher has the choice of reporting such facts to the client, or conducting a reasonable investigation thereon and reporting the results. Whether the attorney was placed on inquiry by discrepancies shown by a survey was a question the court left to the jury.[233] This general outline of a search can be supplemented by all the specific rules developed in title search cases which supply the examiner with particular guidelines.[234]

IX. The Duty to Advise as the Final Test

The search thus described has not exhausted all the questions with which the title searcher must be concerned. The burden of knowing all the settled law imposes on the attorney the nearly insurmountable task of anticipating untold numbers of defects of title. Familiarity with every potential title problem may be simply unobtainable;[235] therefore, the attorney must concern himself with what is probable and what is practicable under the circumstances. Moreover, in title searches, the courts must be concerned with more than just the state of title; they must also inquire into the performance of the attorney in discharging his professional duties to his client. Because he is able to limit his duties, the attorney should be held accountable for whatever results he allows his client to anticipate. If he is to limit his liability, he should dispel any unrealistic expectations his client may have or develop. For example, when a search through the general index is impractical, the client must be advised of the intended use of the tract index only, and more importantly, he must be informed of the risk created thereby. It is actually the failure to inform the client of this risk that should be the basis for liability.[236]

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[230] *E.g.*, Dead River Fishing & Hunting Club v. Stovall, 147 Miss. 385, 395, 113 So. 336, 337 (1927) (directing full investigation of facts contained in recitals).

[231] Reliance on the tract index has been approved by only one court. *See* Hanson v. Zoller, 187 N.W.2d 47, 55-57 (N.D. 1971) (considering use of the general index impracticable). Nevertheless, the tract index is an available tool for establishing the chain of title tentatively. Since the examiner is charged with knowledge of everything in a conveyance in the chain, an arbitrary cut-off date for searches would be an unreasonable risk. *See* St. Regis Pulp & Paper Co. v. Floyd, 238 So. 2d 740, 743-44 (Miss. 1970) (interest reverting over sixty years from date of deed).

[232] 471 S.W.2d 705 (Ky. 1971).

[233] *Id.* at 707-08.

[234] See notes 95 through 189 and accompanying text *supra*.

[235] *See generally* Kubicek & Kubicek, *supra* note 11, at 38.

[236] Those Mississippi attorneys surveyed showed an acute awareness of the duty to

Therefore, the courts should judge title searches not just by the specific procedures followed, but also by the adequacy of the attorney's advice to the client regarding the risks involved. Although the attorney need not use every possible source of information available, he cannot allow the risks created by his omissions to fall on the client. Just as the client is entitled to refuse to accept the risk of taking title, so he must be allowed to refuse the risk of a less than perfect title search. He is unable to appreciate either risk without the help of counsel. The attorney must then inquire into the purpose for the title search and define the risks to be expected from the intended use of his work. Without such advice, the client has not received the help he needed most. The duty of full disclosure[237] thus translates for the title searcher into a duty to provide full advice. The breach of this duty is a tort and the liability created thereby cannot be contracted away.[238]

CONCLUSION

The possibilities for error in title searches are inestimable. Standards of performance vary according to local practice, certainty of law, and sundry other factors that may enter into the court's consideration of an attorney's liability. The cases surveyed by this Comment reveal very few hard-and-fast rules of practice. A survey of certain members of the bar confirmed the existence of confusion on many questions of practice in the area of title searches.[239] In this state of uncertainty, the

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advise their clients. A two-thirds majority claimed to advise their clients of defects that they considered immaterial. Seven out of eight said they gave advice on the risk created by each defect reported. Before commencing the search, five out of six said they ascertained the client's purpose for requesting the title search. Nearly every respondent reported that advice was given on what was omitted from the search either through an oral conference or through written exceptions. SURVEY, *supra* note 1. These responses demonstrate a consciousness of both the client's need for full advice and the attorney's responsibility to make some attempt to furnish it.

[237] See notes 33 through 50 and accompanying text *supra*.

[238] ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 6-102(A). The rule states, "A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice." *Id.*

[239] The twenty-four respondents did not agree completely on the propriety of any one practice covered by the survey questionnaire. SURVEY, *supra* note 1. One notable example is the disagreement over use of indices. One out of three attorneys replying to the questionnaire thought the title searcher should investigate matters of record even though the matters were indexed improperly. On the other hand, three out of eight respondents felt they should only have to find matters indexed in the general index. While some attorneys relied entirely on the general index, others felt they could ignore it. Two attorneys noted that the prevailing practice in Hinds County was to rely on the tract index, but one of them expressed misgivings about this local practice. *Id.* All of these opinions only go to show the diversity of attitudes among the practicing bar. The result of this diversity is to undermine the local practice standard by making a variety of views available from expert witnesses drawn from the local bar. See notes 81 through 94 and accompanying text *supra*.

legal profession can benefit immensely from a change in focus on the question of determining liability in title search matters. The focus should turn from consideration of whether a particular practice is reasonable to an analysis of whether the client has been adequately advised of the risks involved in taking title.

A duty to advise the client adequately can be inferred from the duty of full disclosure imposed by the *American Bar Association Code of Professional Responsibility*.[240] Appropriately, the duty of full disclosure arises under Canon 9 which seeks to "avoid even the appearance of professional impropriety" in order to preserve confidence in the profession.[241] Admittedly, the inquiry into the adequacy of advice given a particular client entails a somewhat subjective analysis, but the avoidance of the hint of impropriety under Canon 9 provides a more certain gauge than a general requirement of performing competently under Canon 6.[242]

The inquiry can be narrowed sufficiently by concentrating on two risks. From the very beginning, the client should be informed of the risks generated merely by the kind of search undertaken. Then he should be informed of the risks discovered by the search. It is too easy to say that the attorney must reveal what he has not looked for, as well as what he has looked for and found. The duty to advise implies a responsibility to see that the advice is understood. This responsibility follows from the client's need to appreciate the risks he accepts. Once he is apprised of these risks, the client "assumes the risks" by taking title. Of course, to the extent that the question of what risks the attorney should report involves the question of what the title search should discover, the analysis involves some circularity. It does not, however, lose all significance, for, in those matters where decisional law provides neither approval nor disapproval for a particular practice, the analysis of whether the client has been advised of his risks offers a litmus test for the title searcher who is uncertain of the adequacy of his performance. Use of this test does more than guard against the appearance of impropriety; it insulates against the enormous potential for liability generated by title searches. In sum, it protects both the profession and the professional.

Albert De Sha Malone

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[240] Hendrickson v. Sears, 310 N.E.2d 131, 135-36 (Mass. 1974).

[241] ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 9.

[242] *Compare id.* Canon 9 *with id.* Canon 6.

RECENT DECISIONS

ANTITRUST—SHERMAN ACT—PARKER DOCTRINE EXEMPTION AVAILABLE TO POLITICAL SUBDIVISION ONLY WHEN SUBDIVISION IS ACTING WITHIN THE AMBIT OF STATE LEGISLATIVE INTENT

Petitioner cities[1] brought an action in the District Court for the Eastern District of Louisiana alleging that respondent Louisiana Power and Light had committed antitrust violations detrimental to the operation of petitioners' electrical utility services.[2] LP&L brought a counterclaim charging antitrust violations on the part of the petitioners.[3] The trial court dismissed the counterclaim and accepted petitioners' argument that municipalities as political subdivisions of the state were not subject to federal antitrust laws[4] under the "state action" doctrine.[5] The Court of Appeals for the Fifth Circuit reversed[6] the trial court's dismissal of respondents' counterclaim.[7] On writ of certiorari the United States Supreme Court, *held*, affirmed. To be exempt from antitrust liability a municipality must establish that the state legislature expressly or impliedly authorized the challenged activity. *City of Lafayette v. Louisiana Power and Light Co.*, 98 S.Ct. 1123 (1978).

The Sherman Act[8] is designed to prevent unfair restraints upon free economic competition.[9] The language of the Act,[10] in its "generality and adaptabil-

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[1] Petitioners were the cities of Lafayette and Plaquemine, Louisiana. City of Lafayette v. Louisiana Power & Light Co., 98 S.Ct. 1123, 1126 n.4 (1978). Under Louisiana law municipalities may own and operate electric utilities both within and outside their city limits. LA. REV. STAT. ANN. §§ 33:1326, 4162-4163 (West 1950).

[2] Petitioners alleged that LP&L engaged in boycotts against them, utilized sham litigation and otherwise attempted to restrain competition. 98 S.Ct. at 1126 n.5. Petitioners also named Middle South Utilities, Inc., the holding company of which Louisiana Power and Light is a subsidiary. Central Louisiana Electric Company, Inc., and Gulf States Utilities, Inc., Louisiana and Texas corporations respectively, were also named as defendants. *Id.* at 1125 n.3.

[3] The counterclaim alleged *inter alia* that petitioner cities had engaged in sham litigation against LP&L to prevent the construction of a generating plant, had attempted to exclude competition by using longterm supply agreements and had taken other anticompetitive actions against LP&L. *Id.* at 1126 n.6.

[4] *Id.* at 1126.

[5] This doctrine was first articulated in Parker v. Brown, 317 U.S. 341, 351 (1943). *See* Verkuil, *State Action, Due Process and Antitrust: Reflections on Parker v. Brown*, 75 COLUM. L. REV. 328, 330 (1975).

[6] City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431, 436 (5th Cir. 1976), *aff'd*, 98 S.Ct. 1123 (1978).

[7] The circuit court observed that the trial court's opinion had been rendered prior to Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). 532 F.2d at 433.

[8] 15 U.S.C. §§ 1-7 (1976).

[9] The Sherman Act is commonly considered to have been a response to economic concentration required by the northern military effort in the Civil War and the demands of settling the Western frontier. J. VAN CISE, UNDERSTANDING THE ANTITRUST LAWS 14-15 (2d ed. 1973). Present opinion is almost as sharply divided in its analysis of the sociopoliti-

ity comparable to that found in constitutional provisions,"[11] has permitted the courts to construe the statute liberally,[12] thereby making it adaptive to changing economic conditions.[13] Despite the salutary aspects of the Act's breadth,[14] its lack of specificity has posed interpretive difficulties.[15] Initially, the contemporary literalistic view of interstate commerce[16] limited the application of the Act.[17] Yet despite repeated constitutional challenge,[18] the ambit of the Sherman Act has expanded coextensively with the commerce power through the so-called "affectation doctrine."[19] This development did not, however, resolve entirely the thorny question of how the courts should reconcile the far-reaching mandate of the Act with the strictures of federalism.[20] In the early case of *Northern Securi-*

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cal background of the Act as were the Act's contemporaries with respect to its merits. *Compare* Letwin, *Congress and the Sherman Antitrust Law: 1887-1890,* 23 U. CHI. L. REV. 221 (1956) *with* H. THORELLI, FEDERAL ANTITRUST POLICY 54-163 (1955). Holmes viewed the Sherman Act as a "humbug based on economic ignorance and incompetence." I HOLMES-POLLACK LETTERS 163 (Howe ed. 1942).

[10] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is . . . illegal." 15 U.S.C. § 1 (1976).

[11] Appalachian Coal, Inc. v. United States, 288 U.S. 344, 359-60 (1933).

[12] *See* Apex Hosiery Co. v. Leader, 310 U.S. 469, 489 (1940).

[13] United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 386 (1956).

[14] "Antitrust laws . . . and the Sherman Act in particular are the Magna Carta of free enterprise." United States v. Topco Assoc., Inc., 405 U.S. 596, 610 (1972).

[15] See Verkuil, *supra* note 5, at 333-40 (liberal construction of antitrust laws is analogous to substantive due process). *See generally* BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978).

[16] *See, e.g.,* Kidd v. Pearson, 128 U.S. 24-26 (1888) (articles will not become interstate commerce until articles are shipped or transportation actually begins).

[17] In United States v. E.C. Knight, 156 U.S. 1 (1895), the first direct consideration by the Supreme Court of the Sherman Act, control of 98% of domestic sugar production was held to be beyond the scope of the Act since manufacturing was viewed as purely intrastate. *Id.* at 17; *see* Hopkins v. United States, 171 U.S. 578, 602 (1898) (buying and selling of cattle in stockyards is intrastate transaction and therefore not covered by the Sherman Act). In a subsequent opinion, the Court remarked that "the *Knight* decision made [the Sherman Act] a dead letter for more than a decade." Mandeville Island Farms v. American Crystal Sugar, 334 U.S. 219, 230 (1948).

[18] *See, e.g.,* Standard Oil Co. v. United States, 221 U.S. 1, 69-70 (1911) (Act was not a usurpation of legislative power by the judiciary); Northern Sec. Co. v. United States, 193 U.S. 197, 305 (1904) (Act does not violate tenth amendment); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 229 (1899) (Act, through commerce power, preempts individual's liberty to enter into contracts which substantially regulate commerce); United States v. Joint Traffic Ass'n, 171 U.S. 505, 572-73 (1898) (Act held not to violate fifth amendment due process property rights). *See generally* Comment, *Portrait of the Sherman Act as a Commerce Clause Statute,* 49 N.Y.U.L. REV. 323 (1974).

[19] Houston, E. & W. Ry. v. United States, 234 U.S. 342, 351-52 (1914). Under this analysis, an activity may be regulated under the commerce clause if it "affects" commerce. *See, e.g.,* Wickard v. Filburn, 317 U.S. 111, 120-24 (1942) (production of wheat by single farmer affects commerce and is therefore subject to federal regulation).

[20] There is no consensus of opinion even as to whether the legislative history of the Sherman Act speaks to this issue, or, if it does, to what purpose it does so. *See generally* THORELLI, *supra* note 9, at 164-66. *Compare* H.R. REP. No. 1707, 51st Cong., 1st Sess.

ties v. United States,[21] two competing and parallel railroads attempted to merge by creating a holding company incorporated in accordance with New Jersey law.[22] Even though the merger was legal under state law, the Supreme Court declared the transaction to be illegal as a violation of the Sherman Act.[23] It is therefore clear that mere compliance by a private person with state law offers no defense against antitrust liability.[24] In another early case, *Olsen v. Smith*,[25] the Court held that although Texas' river pilotage license requirements restricted entry into that profession, such action was not violative of the Sherman Act.[26] In *Olsen*, unlike *Northern Securities*, the challenged activity was that of the state,[27] not a private person.[28] Similarly, the anticompetitive activity in *Olsen* was in furtherance of a state policy,[29] not a private scheme.[30] Finally, compliance with the state regulatory system was required by the state[31] whereas

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(1890) ("No attempt is made to invade the legislative authority of the several states . . . .") *cited by* Verkuil, *supra* note 5, at 331, *with* Donnem, *Federal Antitrust Law Versus Anticompetitive State Regulation*, 39 ABA ANTITRUST SECTION 950, 958 (1970) (any state statute contrary to the Sherman Act would be be invalid under the supremacy clause).

In Parker v. Brown, 317 U.S. 341, 350-51 (1943), a unanimous Court declared: "We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature . . . . [T]he Sherman Act makes no mention of the states as such . . . ." *But see* Slater, *Antitrust and Government Actions: A Formula for Narrowing Parker v. Brown*, 69 NW. U.L. REV. 71, 83-87 (1974).

One commentator has argued that the failure of the Sherman Congress to adopt a "state action" exemption as a provision of that Act despite the proposal of such an amendment by Senator Wilson of Iowa indicates the absence of a legislative intent for such an exemption. White, *Participant Governmental Action Immunity from the Antitrust Laws: Fact or Fiction?*, 50 TEX. L. REV. 474, 482 (1972).

[21] 193 U.S. 197 (1904). This case is cited by Chief Justice Stone in Parker v. Brown, 317 U.S. 341, 351 (1943). *See generally* Note, *Parker v. Brown: A Preemption Analysis*, 84 YALE L.J. 1164 (1975).

[22] 193 U.S. at 321-22.

[23] *Id.* at 360.

[24] *See, e.g.*, SEC v. National Sec., Inc., 393 U.S. 453, 461-64 (1969) (McCarran-Ferguson Act does not bar suit by SEC to rescind state approved merger); Norman's on the Waterfront, Inc. v. Wheattey, 444 F.2d 1011, 1017-18 (3d Cir. 1971) (state authorization of liquor price fixing scheme); United States v. Pacific Southwest Airlines, 358 F. Supp. 1224, 1226 (C.D. Cal.) (authorization of airline merger by state utility commission confers no antitrust immunity to the transaction), *cert. dismissed*, 414 U.S. 801 (1973).

[25] 195 U.S. 332 (1904).

[26] *Id.* at 341-45. *See also* Field v. Barber Asphalt Paving Co., 194 U.S. 618, 622-23 (1904) (municipality's establishment of standards for paving which in effect excluded all sources but one is not antitrust violation); Lowenstein v. Evans, 69 F. 908, 911 (C.C.D.S.C.) (1895) (state monopolization of liquor sales does not violate the Sherman Act).

[27] 195 U.S. at 338-41.

[28] 193 U.S. at 317.

[29] 195 U.S. at 339-41.

[30] 193 U.S. at 325-27.

[31] 195 U.S. at 339-40.

in *Northern Securities* the state merely permitted the activity.[32]

In the seminal case of *Parker v. Brown*,[33] the Court held that a raisin marketing scheme, imposed by California acting "as a sovereign"[34] through its legislature, was exempt from federal antitrust regulation.[35] Indicating that the same activities if privately instigated would violate the Sherman Act,[36] the Court, relying on principles of federalism,[37] declared simply that the Sherman Act does not apply to sovereign state actions.[38] Nevertheless, the Court limited its holding in two respects: a state cannot immunize private violations of federal antitrust laws by "authorizing" such violations,[39] nor may it be a party to private agreements made by private entities to restrain competition.[40] Thus the so-called "state action" or *Parker* exemption is not a carte blanche; it does not grant the state absolute immunity from antitrust laws.[41] The lower federal

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[32] 193 U.S. at 321-22, 325-26.

[33] 317 U.S. 341 (1943). Previously the Court had held that both states, Georgia v. Evans, 316 U.S. 159, 162 (1942), and municipalities, Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 396 (1906), were "persons" within the meaning of that term as used in the Sherman Act. The United States is not a "person" for antitrust purposes. United States v. Cooper Corp., 312 U.S. 600, 607 (1941).

[34] 317 U.S. at 352. This distinction between "sovereign" capacity and "private" capacity had been made previously. *See, e.g.,* Ohio v. Helvering, 292 U.S. 360, 368 (1934); South Carolina v. United States, 199 U.S. 437, 463 (1906).

[35] 317 U.S. at 352; *See* Handler, *The Current Attack on the Parker v. Brown State Action Doctrine,* 76 COLUM. L. REV. 1, 8 (1976).

[36] 317 U.S. at 350. The Court had earlier held in an analogous situation that a state owned and operated railroad, although an instrumentality of that state, was not exempt from the provisions of the Safety Appliance Act. United States v. California, 297 U.S. 175, 186 (1936). In its rationale the Court distinguished between action by the state in its "sovereign" capacity and action in its "private" capacity. *Id.* at 183-84.

[37] "In a dual system of government in which . . . the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U.S. at 351.

[38] *Id.* at 351-52.

[39] *Id.* at 351. The Court cited Northern Sec. Co. v. United States, 193 U.S. 197 (1904), as direct support for this proposition. *Id.*

[40] 317 U.S. at 351-52.

[41] *Id.* at 350-52. In addition to the *Parker* doctrine exemption the Court has recognized one other major exemption from the federal antitrust laws—lobbying, even with anticompetitive intent, is exempt from antitrust laws since a holding to the contrary would inhibit free communication between citizens and their representatives. United Mine Workers of America v. Pennington, 381 U.S. 657, 670 (1965); Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 136-39 (1961). The legal principle expressed in these two cases is generally referred to as the "Noerr-Pennington doctrine." This doctrine has been subsequently modified in California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 512-15 (1972). In *Trucking Unlimited,* defendant highway carriers were allegedly instituting hearings to prevent plaintiff highway carriers from enjoying certain operating rights. The Court held that first amendment rights were not immune from regulation when they were used for antitrust purposes. *Id.* at 515.

A thorough listing of judicial and legislative exemptions from the antitrust laws can be found in Pogue, *The Rationale of Exemptions from Antitrust,* 19 A.B.A. ANTITRUST

courts, however, have not always been sensitive to this limitation.[42] Indeed, fixing the exact perimeters of the "state action"[43] exemption has been extremely difficult.[44] Such ambivalence among the judiciary is hardly surprising since in the *Parker* doctrine two fundamental principles of our society conflict sharply—the federalist system of government which permits each state to run

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SECTION 313, 330-54 (1961).

[12] *See, e.g.*, Padgett v. Louisville & Jefferson County Air Bd., 492 F.2d 1258, 1260 (6th Cir. 1974) (per curiam) (*Parker* immunity for airport granting exclusive service rights to single cab company); Saeny v. University Interscholastic League, 487 F.2d 1026, 1028 (5th Cir. 1973) (absent evidence of conspiracy, state agency is protected from antitrust liability in setting standards for slide rules that excluded plaintiff's product); Ladve Local Lines, Inc. v. Bi-State Dev. Agency, 433 F.2d 131, 137 (8th Cir. 1970) (two states' legislative decision to grant exclusive rights to one bus company was protected under *Parker* doctrine); Wiggins Airways, Inc. v. Massachusetts Port Auth., 362 F.2d 52, 56 (1st Cir. 1966) (granting contract for all ground services to one firm was protected under *Parker* doctrine); Allstate Ins. Co. v. Lanier, 361 F.2d 870, 871-72 (4th Cir.) (fixing of auto insurance rates by bureau created by state was protected under *Parker* doctrine), *cert. denied*, 385 U.S. 930 (1966); Brenner v. State Bd. of Motor Vehicle Mfrs., Dealers & Salesmen, 413 F. Supp. 639, 645-46 (E.D. Pa. 1976) (restriction of entry into car retailing market by state board was protected under *Parker* doctrine); Continental Bus Sys., Inc. v. City of Dallas, 386 F.Supp. 359, 362-63 (N.D. Tex. 1974) (concerted action by two municipalities to eliminate competition in airport busing was protected by *Parker* doctrine); Fleming v. Travelers Indem. Co., 324 F. Supp. 1404, 1406 (D. Mass. 1971) (commissioner who is legislatively empowered to alter nonconforming insurance rates is exempt under *Parker* doctrine); Milay v. John Hancock Mut. Life Ins. Co., 148 F. Supp. 299, 303 (D. Mass.) (state law permitting award of contract to domestic insurance company despite lower bid by foreign corporation was protected by *Parker* doctrine), *aff'd mem.*, 242 F.2d 758 (1st Cir.), *cert. denied*, 355 U.S. 828 (1957); Hitchcock v. Collenberg, 140 F. Supp. 894, 902 (D. Md. 1956) (state licensing system that gives competitive advantage to medical doctors over "naturopaths" is protected under *Parker* doctrine), *aff'd per curiam*, 353 U.S. 919 (1957).

[13] The term "state action" has been expansively defined in the context of the fourteenth amendment. *See generally* Hemphill, *State Action and Civil Rights*, 23 MERCER L. REV. 519 (1972); Comment, *State Action under the Equal Protection Clause of the Fourteenth Amendment and the Remaining Scope of Private Choice*, 50 CORNELL L. Q. 473 (1965).

In striking contradistinction to this ever more expansive construction, "state action" in the context of the *Parker* doctrine has generally been narrowly construed. *See* Cantor v. Detroit Edison Co., 428 U.S. 579, 590-91 (1976). One commentator has even termed the relationship between the modes of analysis "inverse." Verkuil, *supra* note 5, at 330-31 n. 14.

[14] *Compare, e.g.*, New Mexico v. American Petrofina, Inc., 501 F.2d 363, 370-71 (9th Cir. 1974) (anticompetitive actions by states are absolutely exempt from Sherman Act liability even when such actions are not components of a state scheme of regulation 2) *with* Hecht v. Pro-Football, Inc., 444 F.2d 931, 936-38 (D.C. Cir. 1971) (state regulatory action and federal antitrust goals are not mutually exclusive and there may be antitrust violation despite some forms of state involvement), *cert. denied*, 404 U.S. 1047 (1972) *and* Ashville Tobacco Bd. of Trade, Inc. v. FTC, 263 F.2d 502, 509-10 (4th Cir. 1959) (regulation of market by local tobacco boards was violation of Sherman Act despite state authorization). As these cases suggest, the lower federal courts have been divided in their application of the *Parker* doctrine. Generally, however, the trend seems to be toward conferring immunity. *See generally* Handler, *supra* note 35, at 1.

its own affairs, and a free enterprise economic system based on competition. Curiously, except for dictum in one case,[45] the Supreme Court had significantly confronted the *Parker* doctrine only three times prior to the instant case.[46]

In *Goldfarb v. Virginia State Bar*[47] the Court held that a minimum fee schedule for title searches, even though promulgated by the State Bar, violated the Sherman Act. Writing without dissent, the Chief Justice defined the "threshold inquiry"[48] in testing a state action's comprehension within the *Parker* doctrine as whether the state, acting as sovereign, mandated the action.[49] The codefendants[50] were not acting as agents of the state,[51] nor was their implementation of a minimum fee schedule required by state regulation,[52] although the state's supreme court[53] had made references to fee schedules in its ethical code.[54] Thus, the *Parker* doctrine was held inapplicable to actions encouraged but not required by the state "acting as a sovereign."[55] *Cantor v. Detroit Edison*[56] offers a complex consideration of the "state action" doctrine. A bitterly divided Court[57] in a bare plurality opinion[58] restricted the *Goldfarb* construction of the

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[45] Schwegmann Bros. v. Calvert Corp., 341 U.S. 384, 389 (1951) (dictum) ("[W]hen a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids.") (citing *Parker*); *see* Shores, *The State Action Doctrine After Goldfarb and Cantor*, 63 IOWA L. REV. 367, 378 n.67 (1977).

[46] *See* Bates v. State Bar, 433 U.S. 350, 361-63 (1977) (the state constitutional stipulation that the Arizona Supreme Court should set disciplinary standards with regard to legal advertising is a restraint on competition compelled by the state acting as sovereign and therefore within the *Parker* doctrine exemption); Cantor v. Detroit Edison Co., 428 U.S. 579, 595 (1976) (approval by state regulatory commission of light bulb replacement plan by private company does not confer *Parker* immunity); Goldfarb v. Virginia State Bar, 421 U.S. 773, 790-91 (1975) (minimum fee schedule "prompted" by state action, but not compelled, thereby acquires no *Parker* immunity). *See also* Shores, *supra* note 45.

[47] 421 U.S. 773 (1975).

[48] *Id.* at 790.

[49] *Id.*

[50] The defendants were the Virginia State Bar and the Fairfax County Bar. *Id.* at 778.

[51] *Id.* at 791-92.

[52] *Id.* at 790-91.

[53] Specifically entrusted by the state legislature with the regulation of legal practice, the Virginia Supreme Court would presumably enjoy *Parker* doctrine immunity. See notes 71 through 75 and accompanying text *infra*.

[54] 421 U.S. at 789-90 n.19.

[55] *Id.* at 791. The holding in *Goldfarb* may be viewed not so much a restriction as a clarification of the *Parker* doctrine. That the Court did not consider itself to be diluting the doctrine is indicated by the following post-*Goldfarb* dictum: "Virginia is free to require whatever . . . standards it wishes for its pharmacists; it may subsidize them or *protect them from competition* in other ways." Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976) (emphasis added).

[56] 428 U.S. 579 (1976).

[57] "Never in recent memory has an antitrust case so fractionalized the court." Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term—1977*, 77 COLUM. L. REV. 979, 1008 (1977).

[58] Only four justices were in agreement that the case was not controlled by *Parker*. "Since the case now before us does not call into question the legality of any act of the State . . . or any of its officials or agents, it is not controlled by the *Parker* decision." 428

Parker doctrine[59] and held the exemption to be limited to state officers acting in official capacities.[60] The plurality did not formulate a precise test for *Parker* exemption,[61] but did recognize two arguments for extending the exemption,[62] thereby implying, despite the dissent's contention to the contrary,[63] that the Court was not wholly abandoning the *Parker* doctrine, but was narrowly circumscribing its application.[64] At issue in the case was whether a light bulb exchange program operated by the defendant utility company violated the Sherman Act by restraining retail trade in that commodity.[65] Given this somewhat anomalous fact situation, the Court's holding in *Cantor* may be limited to cases in which the anticompetitive conduct approved by the regulatory agency is unrelated to the primary purpose of the regulated entity[66] or where the regulatory

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U.S. at 591-92. Chief Justice Burger's concurrence contained a dissent in response to the plurality's somewhat surprising holding that the "state action" exemption protects only actions by state officials, not private actions. *Id.* at 603-04. Persuasively, the Chief Justice observed that "[i]n interpreting *Parker*, the Court has heretofore focused on the challenged *activity*, not upon the identity of the *parties*." *Id.* at 604 (emphasis in original). Justice Blackmun, concurring, also rejected the plurality's view that the *Parker* doctrine is applicable only to suits against state officials or the state itself. *Id.* at 613 n.5. Justices Stewart, Powell and Rehnquist in dissent also disagreed with the plurality on this point. *Id.* at 616-17. A majority of the court therefore rejected the plurality's restrictive construction of *Parker*. For a brief statement on the *Parker* exemption's applicability to private persons as well as state agents, *see* Handler, *supra* note 35, at 8-9, & 9 nn.42 & 43.

[59] *See generally* Dorman, *State Action Immunity: A Problem Under Cantor v. Detroit Edison*, 27 CASE W.L. REV. 503 (1977); Comment, *The State Action Antitrust Exemption: The Confinement of the Parker Doctrine Within the Emerging Cantor Formula*, 29 HAST. L.J. 211 (1977).

[60] 428 U.S. at 590-91.

[61] *See id.* at 603.

[62] The Court suggested that it would be unjust to expose a private person to treble damage liability merely for obeying a state command. Secondly, it indicated that where an activity is already pervasively regulated by the state, Congress may not have intended to impose potentially conflicting federal regulations. *Id.* at 592-97. One commentator has remarked that the Court studiously "avoid[s] the slightest clue whether either of these reasons could ever be successfully invoked to immunize private conduct." Handler, *supra* note 57, at 1009. It is difficult to see the relevance of either of these arguments—"fairness" or "state preemption"—since the plurality would render the *Parker* doctrine applicable only to state officials.

[63] Dissenting, Justice Stewart remarked that the plurality's "view of *Parker* . . . would trivialize that case to the point of overruling it." 428 U.S. at 616.

[64] *See* Note, *Parker v. Brown Revisited: The State Action Doctrine After Goldfarb, Cantor, and Bates*, 77 COLUM. L. REV. 898 (1977).

[65] The defendant utility company provided replacement light bulbs without direct charge to customers who paid for them indirectly since the cost of the program was incorporated into Detroit Edison's tariff. 428 U.S. at 582-83.

[66] *Contra*, Business Aides, Inc. v. Chesapeake & Potomac Tel. Co., 480 F.2d 754, 756-58 (4th Cir. 1973) (refusal by utility to supply certain services to plaintiff was in accordance with its tariff and therefore protected by *Parker* doctrine); Gas Light Co. v. Georgia Power Co., 440 F.2d 1135, 1137-38, 1140 (5th Cir. 1971) (allegedly unfair competitive tactics against natural gas suppliers by electric utilities was authorized by state regulatory agency and therefore shielded from antitrust liability). These decisions are pre-*Cantor*.

agency is silent regarding the challenged conduct.[67] Characterizing the plurality's reading of the Sherman Act as "Delphic,"[68] the dissent argued that the plurality was authorizing an unprecedented, massive invasion of state sovereignty[69] contrary to *Parker* and the legislative intent manifested by the history of the Sherman Act.[70] In *Bates v. State Bar of Arizona*,[71] the Court, in holding that a ban on advertising by attorneys was not violative of the Sherman Act,[72] distinguished that case from *Goldfarb* by pointing out that the state of Virginia through its supreme court rules merely permitted the anticompetitive activities, whereas the state of Arizona through its supreme court rules compelled the anticompetitive restraint.[73] The Court distinguished its holding from *Cantor* on two grounds. First, unlike *Cantor*, the action in *Bates* was not directed at a purely private defendant.[74] Second, the state in *Cantor* had no independent regulatory interest in light bulb marketing, whereas the state interest in regulating the legal profession is central to its protection of the public.[75] Although failing to provide a clear articulation of the current limits of the *Parker* doctrine, *Bates*, coming one year after *Cantor*, at least indicated that the doctrine retained some degree of viability for the present Court.[76]

In the previous discussion the applicability of the *Parker* doctrine to activities which are either of the state or compelled by the state has been considered.

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[67] *See* City of Mishawaka v. Indiana & Michigan Elec. Co., 560 F.2d 1314, 1320-21 (7th Cir. 1977) (although regulatory agency had approved the retail rate, the electric company's dual rate structure was not protected by the *Parker* doctrine since the total scheme had not been ruled upon); Litton Sys., Inc. v. Southwestern Bell Tel. Co., 539 F.2d 418, 424 (5th Cir. 1976) (defendant accused of predatory pricing of terminal equipment was not protected by *Parker* doctrine although pricing was in accordance with tariff toward which state had practice of "routine acquiescence"); Chastain v. American Tel. & Tel. Co., 401 F. Supp. 151, 159 (D.D.C. 1975) (*Parker* doctrine does not shield anticompetitive restrictions on installations of mobile telephones when practice was not specifically directed by state regulation). *See also* Allegheny Uniforms v. Howard Uniforms, Co., 384 F. Supp. 460, 463 (W.D. Pa. 1974) (State Port Authority in requiring exclusive dealing by its operators with one company was not acting within its legislative mandate and was not protected under *Parker* doctrine); Macom Prod. Corp. v. American Tel. & Tel. Co., 359 F. Supp. 973, 977 (C.D. Cal. 1973) (no state action exemption where utility acted pursuant to tariff requiring utility to create exclusive dealing in signaling equipment, since policy was not result of considered state judgment). *But see* Washington Gas & Light Co. v. Virginia Elec. & Power Co., 438 F.2d 248, 252 (4th Cir. 1971) (state regulatory silence is tantamount to state approval), *cert. denied*, 404 U.S. 1062 (1972).

[68] 428 U.S. at 631.

[69] *Id.* at 630-32.

[70] *Id.* at 630-33. Justice Stewart argued that the judicial expansion of the commerce power made formulation of the *Parker* doctrine necessary in order to preserve principles of federalism. *Id.* at 635-36. Had the commerce power remained "static" there would have been no need for the *Parker* doctrine since federal power would not have extended to the matters that *Parker* exempts. *Id.* See note 20 *supra*.

[71] 433 U.S. 350 (1977).

[72] *Id.* at 359-63.

[73] *Id.* at 359-60.

[74] *Id.* at 361.

[75] *Id.* at 361-62. See notes 65 & 66 and accompanying text *supra*.

[76] *See* 433 U.S. at 359, 363.

Although *Parker* implies that municipalities are within the ambit of the doctrine,[77] the status of the political subdivisions of a state under the federal antitrust laws has been a complex matter.[78] As early as 1906, the Supreme Court ruled that municipalities were "persons" under the Sherman Act.[79] The more difficult problem has been establishing the relationship of municipal or county actions to state actions.[80] In *Lincoln County v. Luning*,[81] the Court held that counties did not enjoy the eleventh amendment immunity extended to states[82] and subsequent decisions have generally indicated that municipalities acquire political power only by state delegation.[83] Other Supreme Court decisions, however, have suggested that these political subdivisions do possess at least a limited amount of autonomous power.[84] Probably because of these varying Supreme Court rulings regarding the immunity of municipal action from antitrust liability, the lower federal courts themselves have been divided.[85] In *Murdock v. City of Jacksonville*,[86] the city granted an exclusive lease for the use of a municipal auditorium by a single wrestling concern. The court, holding for

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[77] Parker v. Brown, 317 U.S. 341, 351-52 (1943). Chief Justice Stone, writing for the Court, observed that the Act's purpose was to restrain individuals and corporations. *Id.*

[78] *See generally* Comment, *Antitrust Law and Municipal Corporations: Are Municipalities Exempt From Sherman Act Coverage under the Parker Doctrine?*, 65 GEO. L.J. 1547 (1977).

[79] Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 396 (1906).

[80] *Compare* Continental Bus Sys., Inc. v. City of Dallas, 386 F. Supp. 359, 362-63 (N.D. Tex. 1974) (concerted action by two municipalities to eliminate competition in operation of bus lines from airport and later raise prices was exempt under *Parker* doctrine) *and* United States v. Yellow Cab Co., 69 F. Supp. 170, 175 (N.D. Ill. 1946) (Sherman Act does not apply to acts of local governments which are necessary for regulation of local problems), *rev'd on other grounds*, 332 U.S. 218 (1947) *with* Kurek v. Pleasure Driveway & Park Dist., 557 F.2d 580, 589-90 (7th Cir. 1977) (actions of municipalities are not accorded the same deference as those of states) *and* George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 31 (1st Cir.) (anticompetitive municipal action not exempt under *Parker* doctrine since state expressly required competitive bidding), *cert. denied*, 400 U.S. 850 (1970).

[81] 133 U.S. 529 (1890).

[82] *Id.* at 530.

[83] *See, e.g.*, City of Trenton v. New Jersey, 262 U.S. 182, 187 (1923) (city is creature of the state and has no intrinsic governmental power); Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907) (state's power over city property is absolute); Barnes v. Merritt, 428 F.2d 284, 288 (5th Cir. 1970) (city ordinances which are contrary to state constitution are void); City of Longview v. First Nat'l Bank, 152 F.2d 97, 98 (5th Cir. 1945) (city exercises local legislative power only by virtue of being a state instrumentality), *cert. denied*, 327 U.S. 784 (1946). *See also* Herget, *The Missing Power of Local Governments*, 62 VA. L. REV. 999 (1976).

[84] *See, e.g.*, National League of Cities v. Usery, 426 U.S. 833, 851 (1976) (municipalities as well as states are free from federal minimum wage restrictions); Gomillion v. Lightfoot, 364 U.S. 339, 344 (1960) (states are restricted by Constitution in the power they may exercise over their municipalities); Village of Euclid v. Amber Realty Co., 272 U.S. 365, 389-90 (1926) (municipalities possess the police power to establish zoning ordinances).

[85] See note 44 *supra*.

[86] 361 F. Supp. 1083 (M.D. Fla. 1973).

the city, found that the city's decision indicated its judgment that competition among wrestling concerns was not desirable and that this policy decision was immune from antitrust attack under the *Parker* doctrine.[87] Yet in *Duke & Co. v. Foerster*,[88] where a municipal corporation and a county chose to exclude plaintiff's malt beverages from sale in certain public facilities,[89] the court, relying on *Goldfarb*, refused to dismiss the antitrust complaint and rejected the defendants' claim of *Parker* immunity.[90] The court's analysis clearly implied that political subdivisions of states are shielded from antitrust liability only to the extent that they function as agents of the state itself in its sovereign capacity.[91] Furthermore, although the court stated that the statutory authorization for the anticompetitive activity need not be express,[92] the court did not find the general statutory authority granted to the defendants to be sufficient.[93]

In the instant case, the plurality[94] reasoned that municipalities, as "persons" under the Sherman Act,[95] must comply with federal law.[96] Noting that a municipally-owned utility is as capable of unfair restraint of trade as a private, profit-motivated business,[97] and that our national economic policy of competition is too important to be left to the chances of local political influence,[98] the Court held that municipalities per se are not insulated from antitrust liability.[99] Furthermore, since the *Parker* doctrine applies only to governmental acts of the state in its sovereign capacity,[100] and since every act by a municipality acting

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[87] *Id.* at 1093; *see* Metro Cable Co. v. CATV of Rockford, Inc., 516 F.2d 220, 232 (7th Cir. 1975) (city's grant of cable television monopoly was not violative of antitrust laws); New Mexico v. American Petrofina, Inc., 501 F.2d 363, 371 (9th Cir. 1974) (anticompetitive activities of state and its subdivisions are absolutely exempt from Sherman Act).

[88] 521 F.2d 1277 (3d Cir. 1975).

[89] *Id.* at 1278-79. The defendants acted under a general state statutory mandate permitting them to enter into contracts " 'necessary or convenient for the carrying on of . . . business.' " *Id.* at 1281.

[90] *Id.* at 1282.

[91] *Id.* at 1280. In its analysis the court seemed to follow the view of municipalities asserted in City of Trenton v. New Jersey. *See* note 83 and accompanying text *supra.*

[92] 521 F.2d at 1280.

[93] *Id.* at 1281. See note 89 *supra. See also* Kurek v. Pleasure Driveway & Park Dist., 557 F.2d 580, 589-90 (7th Cir. 1977) (effort by municipality to create price fixing scheme was without state statutory authority and therefore the action was not protected by *Parker* doctrine); George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 31 (1st Cir.) (municipal attempt to create swimming pool monopoly was not protected under *Parker* doctrine since state statutorily required competitive bidding), *cert. denied,* 400 U.S. 850 (1970).

[94] The plurality included Justices Brennan, Marshall, Powell and Stevens. 98 S. Ct. at 1123, 1125. Chief Justice Burger filed a separate opinion concurring in part and concurring in the judgment. *Id.* at 1139-43. See note 107 *infra.*

[95] See note 33 *supra.*

[96] The plurality indicated, however, that the penalties imposed on a private antitrust violator might not be appropriate for a governmental entity. 98 S.Ct. at 1123, 1131.

[97] The Court noted the allegations of anticompetitive tie-ins and sham litigation. *Id.* at 1131-32.

[98] *Id.* at 1133-34.

[99] *Id.* at 1134.

[100] *Id.* (citing Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975)).

as an administrative agent of the state[101] is not ipso facto a sovereign act of the state,[102] the acts of municipalities do not enjoy the same federal deference as do acts of states.[103] In fact, the extension of *Parker* immunity to cities, the Court reasoned, would frustrate the federal policy of promulgating competition without necessarily protecting state sovereignty.[104] Therefore, absent evidence[105] that the municipality is acting to further some sovereign state policy to replace competition with regulation or monopoly,[106] there is no *Parker* immunity for anticompetitive municipal actions.[107]

Justice Stewart was joined by Justices White, Rehnquist, and Blackmun[108] in a lengthy and complex dissent.[109] He argued that since the legislative history of the Sherman Act indicates a lack of intent to include governmental action,[110] since municipalities are instruments of the state,[111] and since, unlike private business,[112] their commercial activities are subject to "direct popular control"

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[101] 98 S.Ct. at 1135.

[102] See notes 50 through 55 and accompanying text *supra*.

[103] 98 S.Ct. at 1136 (citing Edelman v. Jordan, 415 U.S. 651, 667 n.12 (1974)) (counties do not enjoy eleventh amendment immunity) and Lincoln County v. Luning, 133 U.S. 529, 530 (1890) (counties do not enjoy eleventh amendment immunity)).

[104] 98 S.Ct. at 1136, 1138. Such an extension might render municipal actions beyond the control of the state itself. *Id.* at 1137 n.44.

[105] This evidence need not be explicitly articulated. *Id.* at 1138.

[106] *Id.* at 1137.

[107] *Id.* at 1143. Concurring in Part I of the plurality opinion and the result, Mr. Chief Justice Burger argued that the plurality's analysis fell short because of its failure to distinguish a "[s]tate's entrepreneurial personality" and its identity as a sovereign in which capacity it may "replace competition with regulation." *Id.* at 1142 (citing United States v. California, 297 U.S. 175, 183-86 (1936) and Ohio v. Helvering, 292 U.S. 360 (1934)). According to his own analysis, this distinction is determinative since it is illogical that activities engaged in by the state (or its subdivisions) in its entrepreneurial or "proprietary" capacities should be treated differently from the way the same activities carried out by a private entity should be treated. *Id.* at 1141-42. Principles of federalism, however, dictate that where the state is engaged in "functions essential to [its] separate and independent existence," then these activities "may not be impaired by Congress." *Id.* at 1142. In the Chief Justice's view, operating an electric utility is not such a function. *Id.* Accordingly, he would require that the anticompetitive action of the municipality be essential to some sovereign state policy. *Id.* at 1143.

Responding to the Chief Justice's separate opinion, Justice Stewart, writing for the dissenting justices, rejected the distinction between the state's acting in its proprietary capacity and in its sovereign capacity as being incapable of precise differentiation. *Id.* at 1147.

[108] Justice Blackmun did not join in Part II-B of the dissent and filed a short separate opinion primarily devoted to emphasizing his concern with the issue of damages. 98 S. Ct. at 1151.

[109] *Id.* at 1144-51.

[110] *Id.* at 1144-46.

[111] *Id.* at 1145 (citing Lousiana v. Mayor of New Orleans, 109 U.S. 285, 287 (1883)).

[112] "The distinction established in *Parker v. Brown* was not one between actions of a state legislature and those of other governmental units. Rather, the Court drew the line between private action and governmental action." 98 S.Ct. at 1145.

which can counteract abuses,[113] such enterprises should be immune from Sherman Act liability.[114] Despite the fact that a state may delegate its own political power to its subdivisions,[115] the dissent noted, the plurality would grant *Parker* immunity to municipal actions only to the extent that such actions were clearly within some legislative intent.[116] Yet, the dissent argued, the plurality's new test for intent is both poorly adapted to the actual legislative process in most states[117] and unreasonably intrusive into the internal operations of state government.[118] Furthermore, the dissent contended, the imprecision of the plurality's new test for *Parker* immunity[119] will discourage the states from experimenting with innovative economic policies[120] and will invite a return to the discredited practice of excessive judicial examination of the "reasonableness" of state policies.[121] Finally, the dissent expressed concern that the plurality would expose municipalities and their taxpayers to potentially ruinous treble damage liability.[122]

The instant case will eliminate the confusion over the extent to which municipal actions are exempt from antitrust liability under the *Parker* doctrine. In effect the Court has held that the acts of municipalities are not inherently "sovereign" for purposes of antitrust analysis.[123] Indeed, the distinction made in *United States v. California*[124] between "sovereign" acts and "private" acts of the states is held to be inapplicable to the acts of a state's political subdivisions.[125] The instant case will permit municipal acts to attain "sovereignty" only to the extent that the challenged act is within the scope of some state legislative intent.[126]

The Court's restrictive construction of the *Parker* doctrine is susceptible to criticism on at least three grounds. First, the instant case will greatly complicate

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[113] *Id.* at 1145-46.

[114] *Id.*

[115] "Such local self-government . . . allows a state legislature to devote more time to state-wide problems without being burdened with purely local matters, and allows municipalities to deal quickly and flexibly with local problems." *Id.* at 1148. *But see* note 104 and accompanying text *supra.*

[116] *Id.* at 1127.

[117] "[S]tate statutes often are enacted with little recorded legislative history and the bare words of a statute will often be unilluminating in interpreting legislative intent." *Id.* at 1149 (citation omitted).

[118] *Id.* at 1150.

[119] *Id.* at 1148-50.

[120] *Id.* at 1150.

[121] *Id.*

[122] *Id.* at 1151.

[123] *See* note 84 and accompanying text *supra.*

[124] 297 U.S. 175 (1936). See discussion of Chief Justice Burger's concurrence in note 107 *supra.*

[125] Apparently all autonomous municipal actions are to be viewed as "private" for the purposes of antitrust analysis. *But cf.* 98 S.Ct. at 1135-36 n.40 (distinguishing *Cantor* from *Lafayette* on grounds that the defendant in *Cantor* was a private entity and thereby implying that municipalities are different from private persons in some inherent respect).

[126] "[T]he plurality has effectively limited the governmental action immunity of the *Parker* case to the acts of a state legislature." *Id.* at 1144; *cf.* notes 81 through 83 and accompanying text *supra.*

the delegation of authority by a state to its political subdivisions.[127] Each local economic decision will require a legislative dispensation by the state with the result that local governments will be unable to respond rapidly or flexibly to local problems. Additionally, state legislatures will be required to devote an inordinate amount of time to problems of a purely local nature.[128] As a consequence, the efficiency of both state and local government may be impaired. Second, the plurality's test for protection of muncipalities under the *Parker* doctrine is imprecise.[129] Although the plurality would not require a municipal action to be authorized by specific legislation,[130] it does not indicate what degree of legislative authorization for the municipal act will suffice. As the dissent observes, the municipalities in the instant case did possess at least a general legislative mandate for their challenged activities.[131] Ultimately, the vagueness of the test may dictate that every municipal action be considered suspect until certified by a federal court to be within the ambit of legislative intent. Such extensive federal judicial supervision of the internal affairs of a state has been renounced by the Court itself[132] and will hinder the state's efficient management of its own affairs.[133] Finally, the holding in the instant case will expose municipalities to serious treble damage liabilities.[134] It does not seem equitable to impose upon taxpayers of a municipality the burden of payment for such damages since they have generally had only the most tenuous association with the formulation of the offending policy.[135]

Nevertheless, the Court has not abolished the *Parker* doctrine. A municipality may still be shielded by that doctrine if its action has state legislative authority. Cities will not, however, be permitted to clothe capricious or arbitrary acts in *Parker* immunity.[136] The dissent argues that direct political control by the community over its local officials will prevent abuses.[137] This argument fails to consider, however, that, to the extent it is true, it relates only to the protec-

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[127] There were, as of 1972, 62,437 separate units of local government in the United States. *Id.* at 1134 & n.34 (citing UNITED STATES BUREAU OF CENSUS, 1972 CENSUS OF GOVERNMENT, GOVERNMENTAL ORGANIZATION 1 (1973)). Since there are only 50 states, the amount of oversight to be required of each state is staggering.

[128] 98 S.Ct. at 1148.

[129] *Id.* at 1148-49.

[130] "[A] political subdivision [need not] necessarily . . . be able to point to a specific, detailed legislative authorization before it properly may assert a *Parker* defense . . . ." *Id.* at 1138.

[131] *Id.* at 1148-49 & n.17; *cf.* Duke & Co., Inc. v. Foerster, 521 F.2d 1277, 1280-81 (3d Cir. 1975) (statutory language empowering municipality to enter into all contracts "necessary and convenient" did not authorize exclusive dealing contract); *see* note 89 and accompanying text *supra.*

[132] 98 S.Ct. at 1150 & n.28.

[133] *See generally* THE FEDERALIST PAPERS, No. 46.

[134] The plurality refused to consider this issue. *See* 98 S.Ct. at 1131 & n.22.

[135] Such damages might be barred under the so-called "fairness" test suggested in *Cantor. See* note 62 *supra.*

[136] *But cf.* Murdock v. City of Jacksonville, 361 F. Supp. 1083, 1091-93 (M.D. Fla. 1973) (award of exclusive rights to municipal auditorium to one of several competing wrestling concerns held immune under *Parker* doctrine).

[137] 98 S.Ct. at 1145-46.

tion of local concerns. As the plurality notes,[138] there is no reason to assume that local elected officials will be restrained from damaging those outside their constituency. Clearly, our national policy of fostering competition is too important to be left to depend on the vicissitudes of local political influence. To permit municipalities to put their own narrow self-interest above national policy would frustrate the essential design of the Sherman Act.[139] Moreover, granting per se immunity to the autonomous acts of municipalities would not further the purposes of federalism since such a holding might well place the anticompetitive decisions of a municipality beyond the review of the state.[140] In conclusion, despite the potential difficulties in applying the Court's new construction of the *Parker* doctrine, the result is beneficial. Had the dissenting opinion prevailed, yet another tool would have been put into the hands of those elements of society[141] who would dismantle the regime of free competition which the Sherman Act sought to establish as the fundamental principle of our national economic life.[142]

Allan P. Bennett

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[138] *Id.* at 1133.

[139] *Cf.* Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935) (our constitutional order is based on the premise that "the several states must sink or swim together").

[140] 98 S.Ct. at 1137-38 n.44.

[141] *See* Slater, *supra* note 20, at 109. *See generally Capitalism, Socialism and Democracy: A Symposium,* 65 COMMENTARY 29 (1978).

[142] 98 S.Ct. at 1133-34.

Jurisdiction and Venue—Valid Default Judgment Requires Bona Fide Effort to Serve Defendant in County of Suit

Plaintiff, Great Southern Mortgage and Loan Corporation, a nonresident corporation domiciled in Louisiana,[1] brought suit in the county court of Pike County against Christine Gillard and Marietta Green for the amount due on a promissory note executed by the defendants to the plaintiff.[2] The defendants were personally served with process in the counties of their residence, Calhoun and Marshall, respectively.[3] The defendants failed, however, to respond to the service of process[4] and a default judgment was entered against them.[5] Motivated by writs of garnishment, the defendants brought an action to vacate the default judgment, contending that since a resident defendant has the right to be sued in the county of his residence or household,[6] the court in Pike County lacked jurisdiction to render a binding judgment against them.[7] The county court accepted the defendant's argument and vacated the default judgment.[8] The circuit court of Pike County reversed, reinstating the original default judgment and ruling that, by their failure to respond to service of process, the defendants had waived their objection that the suit was brought in a county of improper venue.[9] On appeal to the Mississippi Supreme Court, *held,* reversed. When a plaintiff does not make a bona fide and reasonable effort to file suit in the county where

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[1] Great Southern Mortgage and Loan Corporation was domiciled in Oakdale, Louisiana. Gillard v. Great S. Mortgage & Loan Corp., 354 So. 2d 794, 795 (Miss. 1978).

[2] *Id.*

[3] *Id.*

[4] *Id.* The opinion does not state why the defendants failed to respond to process.

[5] *Id.*

[6] *Id.* The court noted that since the defendants did not reside, the cause of action did not accrue, and process was not served in Pike County, the service of process failed to meet the venue requirements of the Mississippi general venue statute.

The applicable venue statutes provide:

> Civil actions of which the circuit court has original jurisdiction shall be commenced in the county in which the defendant or any of them may be found, and if the defendant is a domestic corporation, in the county in which said corporation is domiciled, or in the county where the cause of action may occur or accrue except where otherwise provided . . . . If a citizen resident in this state shall be sued in any action, not local, out of the county of his household and residence . . . the venue shall be changed, on his application, before the jury is impaneled, to the county of his household and residence . . . .

Miss. Code Ann. § 11-11-3 (1972) [hereinafter referred to as the general venue statute].

> Where an action is brought in any circuit, chancery, county, or justice of the peace court of this state, of which the court in which it is brought has jurisdiction of the subject matter, but lacks venue jurisdiction, such action will not be dismissed because of such lack of proper venue, but on objection on the part of the defendant shall, by the court, be transferred to the venue to which it belongs.

Id. § 11-11-17.

[7] 354 So. 2d at 795. The defendants relied upon Miss. Code Ann. § 11-11-3 (1972), and Bryant v. Lovitt, 231 Miss. 736, 97 So. 2d 730 (1957). 354 So. 2d at 795.

[8] 354 So. 2d at 795.

[9] *Id.*

the defendants or one of them may be found, the defendant's failure to respond to service of process is not a waiver of venue, and a default judgment granted against him may be vacated. *Gillard v. Great Southern Mortgage & Loan Corp.*, 354 So. 2d 794 (Miss. 1978).

Venue and jurisdiction are generally conceived as distinct and definable concepts. The fundamental difference between the two is that jurisdiction involves the authority or power of a court to act, whereas venue concerns the place where the power to adjudicate is to be exercised.[10] This distinction is, however, evasive and confusing since both concepts address the problem of the proper court in which an action should be brought.[11]

The concept of jurisdiction[12] has origins in both English common law[13] and Roman civil law.[14] Based upon the principle that a court must be able to exercise physical power over a person or property before its judgment can be binding,[15] jurisdiction was defined as the power of a court to decide a certain controversy. That construction has carried over to modern times.[16] Consequently, jurisdiction

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[10] *See* Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 167-68 (1939) (definitions for jurisdiction and venue of federal courts); Grenada Bank v. Petty, 174 Miss. 415, 423, 164 So. 316, 317 (1935) (definitions for jurisdiction and venue of Mississippi courts).

A precise, often used theoretical distinction was adopted by the Massachusetts Supreme Judicial Court:

> Jurisdiction is a term of comprehensive import. It concerns and defines the powers of judicatories and courts. It embraces every kind of judicial action touching the subject of the action, suit, petition, complaint, indictment or other proceeding. It includes power to inquire into facts, to apply the law, to make decision and to declare judgment. Venue in its modern and municipal sense relates to and defines the particular county or territorial area within the State or district in which the cause or prosecution must be brought or tried. It commonly has to do with geographical subdivisions, relates to practice or procedure, may be waived, and does not refer to jurisdiction at all.

Paige v. Sinclair, 237 Mass. 482, 130 N.E. 177, 178-79 (1921) (citations omitted).

[11] The similarity flows from the construction of all the rules of venue and some rules of jurisdiction in terms of the proper geographical boundaries in which the action may be brought. See F. JAMES & G. HAZARD, CIVIL PROCEDURE § 12.1, at 601 (2d ed. 1977) (background on jurisdiction and venue). *See generally* Stevens, *Venue Statutes: Diagnosis and Proposed Cure*, 49 MICH. L. REV. 307 (1961).

[12] "Jurisdiction" is derived from two Latin words, "juris" and "disco," which taken together mean "I speak the law." *See* Fraga v. State Compensation Comm'n, 125 W. Va. 107, 23 S.E.2d 641, 643 (1942) (discussing jurisdiction in a workmen's compensation case).

[13] Authority over a person or thing within the boundaries of a territory was the basis of jurisdiction in the earliest common law. Juge, *Jurisdiction & Venue*, 22 LOY. L. REV. 3, 4 (1975); Note, *Developments in the Law—State Court Jurisdiction*, 73 HARV. L. REV. 909, 915 (1960).

[14] The Roman theory of civil jurisdiction was based upon the defendant's place of domicile. *See* Juge, *supra* note 13, at 3 (basis of jurisdiction in civil law); Note, *supra* note 13, at 913 (same).

[15] Foster, *Place of Trial in Civil Actions*, 43 HARV. L. REV. 1217, 1217 (1930). *See also* Stevens, *supra* note 11, at 325. *But see* Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 296-300 (1956).

[16] *See, e.g.*, Industrial Addition Ass'n v. Commissioner, 323 U.S. 310 (1945), in which

vests in a court by operation of law, cannot be conferred[17] or waived[18] by the litigants, and may be contested at any time.

Each state has the authority, subject only to the limitations and superseding effects of the United States Constitution and federal laws,[19] to formulate rules of jurisdiction within its own court system.[20] The rules of jurisdiction thus vary from state to state, but are basically formulated according to subject matter and territory.[21] Subject matter jurisdiction is defined in terms of the type of action brought, the class to which that action belongs, and the nature of the relief sought.[22] Territorial jurisdiction is defined in terms of the geographical

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the Court stated:

> The use of juxtaposition, in the statute, of the terms "jurisdiction" and "venue" marks a significant distinction. On the one hand, the statute confers power on Circuit Courts of Appeals generally, to act judicially on petitions for review presented to them—which is "jurisdiction." On the other, such of those courts as are specified by the statute . . . are designated as the place where, for convenience of the courts or parties or both, the petition will be heard—which is "venue."

Id. at 313 (construing sections of the Internal Revenue Code). *See generally* Daniel & Sams, *Jurisdiction and Venue,* in CIRCUIT COURT PRACTICE 1 (M.L.I. 1966), wherein the authors state:

> Venue is to be distinguished from jurisdiction. While the latter has reference to the power of the court to adjudicate, venue relates to the place where the proceedings are conducted. Venue is designed for the convenience of the litigants; jurisdiction is more generally of a public nature expressing the policy of the state with respect to the exercise and distribution of authority.

Id. at 35.

[17] Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 167 (1939) ("[T]he jurisdiction of the federal courts—their power to adjudicate—is a grant of authority to them by Congress and thus beyond the scope of the litigants to confer.").

[18] Daniel & Sams, *supra* note 16, at 5. *See generally* F. JAMES & G. HAZARD, *supra* note 11, at 605.

[19] *See generally* Hart, *The Relations Between State and Federal Law,* 54 COLUM. L. REV. 489, 491 (1954) (control of court systems); Note, *supra* note 13, at 912 (jurisdiction determined by laws of the sovereign). The many constitutional limits on state court jurisdiction are outside the scope of this note. For a general discussion of this area of the law, see F. JAMES & G. HAZARD, *supra* note 11, at 624-26.

[20] State authority is conferred by general reference in the tenth amendment which provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

Within each state, the jurisdiction of the court system is established by a combination of state constitutional and statutory provisions. *See, e.g.,* MISS. CONST. art. 6, § 156 (circuit court jurisdiction); MISS. CODE ANN. § 9-5-81 (1972) (chancery court jurisdiction); *id.* § 9-7-83 (circuit court jurisdiction); *id.* § 9-9-1 (county court jurisdiction).

[21] The division of jurisdiction into territorial jurisdiction and subject matter jurisdiction has been frequently recognized. *See, e.g.,* Turnbaugh v. Dunlop, 406 Ill. 573, 94 N.E.2d 438, 440 (1950) (territorial jurisdiction should not be confused with subject matter jurisdiction); American Historical Soc'y v. Glenn, 131 Misc. 291, 277 N.Y.S. 174, 178-79 (1928) (jurisdiction has twofold significance); McCollough v. Scott, 182 N.C. 865, 109 S.E. 789, 793 (1921) (jurisdiction embraces both subject matter and territory).

[22] The Mississippi Supreme Court has defined subject matter jurisdiction as "the

area over which the power of the court extends; its application is determined by the location of the parties or property involved rather than by the subject matter or type of controversy.[23]

The concept of venue[24] in the English common law was derived from the principle that jurors should rely upon personal knowledge in deciding questions of fact.[25] Thus, venue referred to the locality from which jurors were summoned,[26] and derivatively, to the locality where the disputed transaction occurred.[27] This common law principle has evolved into the present day notion that venue refers to the place of trial.[28] With the exception of local actions,[29] the major purpose of venue rules is to provide the parties with a fair and convenient place for trial.[30] Since venue is for the convenience of the litigants, it is a per-

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power of the court to hear and determine cases of the general class to which the particular case belongs . . . . The subject matter means the nature of the cause of action and relief sought." Duvall v. Duvall, 224 Miss. 546, 552, 80 So. 2d 752, 754 (1955) (citations omitted).

Subject matter jurisdiction cannot be waived or granted by the parties. *See* Daniels & Sams, *supra* note 16, at 5 (discussion of waiver); Holmes, *Territorial Jurisdiction,* 29 MISS. L.J. 320, 322 (1958) (discussion of subject matter jurisdiction).

[23] *See, e.g.,* Ahrens v. Clark, 335 U.S. 188, 190 (1948) (jurisdiction of the federal district court is territorial); Brashier v. J.C. O'Conner & Sons, 181 Miss. 872, 881, 180 So. 67, 69 (1938) (lack of territorial jurisdiction over nonresidents of the state). *See generally* Holmes, *supra* note 22, at 320-21, 329.

The concept of territorial jurisdiction is derived from the early common law theories of jurisdiction. Soper, *A Question of Venue,* 43 MISS. L.J. 130, 131 (1972). The court is said to acquire territorial jurisdiction when a proper party defendant is served with process. Dunn, *Venue and Jurisdiction in the Circuit Court,* 30 MISS. L.J. 352, 355 (1959).

[24] Theoretically, venue is a procedural question. *See* Paige v. Sinclair, 237 Mass. 482, 130 N.E. 177, 178-79 (1929) (venue relates to practice or procedure); Chemical Tank Lines, Inc. v. Davis, 141 W. Va. 488, 93 S.E.2d 28, 32 (1956) (venue is procedural); Stevens, *supra* note 11, at 307 (discussion of current venue procedures).

As a procedural question, venue is properly within the rulemaking power of the Mississippi Supreme Court. *See* Newell v. State, 308 So. 2d 71, 76 (Miss. 1976) (court has inherent power to formulate procedural rules); Southern Pac. Lumber Co. v. Reynolds, 206 So. 2d 334, 335 (Miss. 1968) ("The phrase 'judicial power' in section 144 of the Constitution includes the power to make rules of practice and procedure not inconsistent with the Constitution, for the efficient disposition of judicial business.").

[25] Wicker, *The Development of the Distinction Between Local and Transitory Actions,* 4 TENN. L. REV. 55, 56 (1925). *See generally* Blume, *Place of Trial in Civil Cases,* 48 MICH. L. REV. 1 (1949); Foster, *supra* note 15; Holmes, *supra* note 22.

[26] Foster, *supra* note 15, at 1217; Holmes, *supra* note 22, at 322.

[27] Blume, *supra* note 25, at 12, 23.

[28] See text accompanying note 10 *supra.*

[29] According to the "classic distinction," an action is local if the underlying transaction is necessarily local; it is transitory if the transaction might have occurred anywhere. *See* Daniels & Sams, *supra* note 16, at 5, 43; Dunn, *supra* note 23, at 371; Wicker, *supra* note 25, at 62. *See generally* Currie, *The Constitution and the "Transitory" Cause of Action,* 73 HARV. L. REV. 36, 66-69 (1959).

[30] *See* Daniels & Sams, *supra* note 16, at 35; Foster, *supra* note 15, at 1217; Stevens, *supra* note 11, at 317.

sonal privilege[31] that may be waived affirmatively[32] or lost if not seasonably asserted.[33] Venue statutes vary widely from state to state[34] since each state is vested with the authority to formulate its own venue rules through constitutional provisions, statutes, or court rules.[35]

While the theoretical distinction between jurisdiction and venue is clear, the distinction is in practice distorted by the function of service of process. Service of process was primarily intended to give a defendant notice of a pending action to allow him a reasonable time to prepare an adequate defense.[36] Its importance to the jurisdiction-venue distinction stems from the modern view of service of process as a necessary ingredient in obtaining jurisdiction over the person of the defendant[37] and in determining the proper venue of an action.[38] For example, the Mississippi venue statute provides that for a suit against an individual resident defendant, venue properly lies in the county where the defendant may be found or summoned.[39] The territorial jurisdiction of the court in the county where the defendant is found "attaches" to the defendant when he is served with process issued from the court.[40] If the defendant is served with

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[31] Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 167 (1939); Stanley v. Cruise, 134 Miss. 542, 547, 99 So. 376, 377 (1924); Catlett v. Drummond, 113 Miss. 450, 456, 74 So. 323, 324 (1917). *Contra,* Jeffreys v. Clark, 251 Miss. 129, 142, 168 So. 2d 662, 668 (1964); Crosby v. Robertson, 243 Miss. 420, 426, 137 So. 2d 916, 918 (1962); Long v. Patterson, 198 Miss. 554, 562, 22 So. 2d 490, 492 (1945); Trolio v. Nichols, 160 Miss. 611, 617, 133 So. 207, 208 (1931); Cain v. Simpson, 53 Miss. 521, 524 (1876).

[32] *E.g.,* Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 167 (1939) (designation of agent to receive service of process in a state waives objection to venue); King v. Ainsworth, 225 Miss. 248, 250, 83 So. 2d 97, 98 (1955) (objection to venue waived by filing counterclaim); Indianola Cotton Oil Co. v. Crowley, 121 Miss. 262, 265, 83 So. 409, 410 (1920) (pleading general issue waived objection to venue).

[33] *E.g.,* Panhandle E. Pipeline Co. v. Federal Power Comm'n, 324 U.S. 635, 639 (1945); Industrial Addition Ass'n v. Commissioner, 323 U.S. 310, 313 (1945); Ainsworth v. Blakeney, 232 Miss. 297, 306, 98 So. 2d 880, 884 (1957).

[34] For a survey of state venue provisions, see Stevens, *supra* note 11, at 311-15.

[35] Clark v. Louisville & N.R.R., 158 Miss. 287, 304, 130 So. 302, 307 (1890); *see* Daniels & Sams, *supra* note 16, at 37.

[36] Miller, *Implementing Current Theories of Jurisdiction, Venue, and Service of Process—Proposals for Revision of the Ohio Statutes,* 29 OHIO ST. L.J. 116, 120 (1968).

[37] Service of process should be viewed, however, as a condition to the exercise of jurisdiction, not as a separate basis of jurisdiction. *See* Stevens, *supra* note 11, at 325.

[38] *Id.* at 313-14. In the majority of states, however, service of process is valid statewide, has no relationship to venue, and serves only to notify the defendant of the action. *Id.* at 325-26.

[39] MISS. CODE ANN. § 11-11-3 (1972); *see* note 6 *supra.* This type of provision has been widely criticized:

> It is difficult to find any sound reason for venue based upon where the defendant may be found. It serves no useful purpose—no trial convenience of either witnesses or parties. It is a good example of historical hangover—a type of provision which has long since outlived its usefulness. *The problem which this type of provision was designed to solve was and is not one of venue but of service of process.*

Stevens, *supra* note 11, at 313-14 (emphasis added).

[40] Dunn, *supra* note 23, at 355; *see* cases cited in note 41 *infra.*

process in a county other than where the suit was brought, the territorial jurisdiction of that court fails to attach.[41] Thus, the court's territorial jurisdiction depends upon proper service of process, which in turn depends upon proper venue.[42] Similarly, whether venue is proper is a function of whether the court's jurisdiction attached to the defendant, which is determined by whether process was served on the defendant in the county where the suit was brought.[43]

It has been suggested that the jurisdiction-venue confusion is, at its core, the result of careless and narrow statutory design coupled with vague and unclear statutory wording.[44] For example, the Mississippi Supreme Court has stated that venue is jurisdictional,[45] and the term "venue jurisdiction" appears in one Mississippi statute[46] as well as several Mississippi Supreme Court opinions.[47] Although each state has constitutional or statutory provisions dealing with jurisdiction and venue,[48] none provides a statutory definition of either term.[49]

The general venue statute presently in effect in Mississippi was enacted in 1822.[50] This statute sets venue for a civil action against a resident citizen in the country where he may be found.[51] Where suit has been filed in a county of improper venue, the statute provides that the defendant may, by application to the court before the jury is empaneled,[52] have the action transferred to the county of proper venue unless his objection has been waived.[53] The Mississippi Supreme Court has consistently applied this statute by holding that where a defendant makes an appearance without asserting the lack of proper venue, his objection to venue has been waived and may not later be asserted.[54] For exam-

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[41] *E.g.*, Bryant v. Lovitt, 231 Miss. 736, 742, 97 So. 2d 730, 731 (1957); Cook v. Pitts. 114 Miss. 39, 45, 74 So. 777, 778 (1917); Campbell v. Triplett, 74 Miss. 365, 367, 20 So. 844, 844 (1896); Pate v. Taylor, 66 Miss. 97, 98, 5 So. 515, 516 (1888); Bank of Vicksburg v. Jennings, 6 Miss. (5 How.) 425, 426 (1841).

[42] *See generally* Soper, *supra* note 23, at 132-34.

[43] See cases cited in note 41 *supra*.

[44] *See, e.g.*, Turnbaugh v. Dunlop, 406 Ill. 573, 94 N.E.2d 438, 439 (1950) (narrow interpretations confound the questions of territorial jurisdiction and venue). *See generally* Miller, *supra* note 36, at 215; Stevens, *supra* note 11, at 317, 320.

[45] *E.g.*, Ravesies v. Martin, 190 Miss. 92, 100, 199 So. 282, 284 (1940) (en banc).

[46] MISS. CODE ANN. § 11-11-17 (1972). Reference to "venue jurisdiction" might have resulted from the court's language prior to the 1940 enactment of the statute. Daniels & Sams, *supra* note 16, at 36.

[47] *E.g.*, Wofford v. Cities Service Oil Co., 236 So. 2d 743, 744 (Miss. 1970); Leake County Coop. (AAL) v. Dependents of Barrett, 226 So. 2d 608, 609 (Miss. 1969); Ainsworth v. Blakeney, 232 Miss. 297, 306, 98 So. 2d 880, 884 (1957).

[48] *See* Stevens, *supra* note 11, at 317 & n.30 (jurisdiction statutes); *id.* at 318 (venue statutes).

[49] *Id.* at 317-18.

[50] MISS. CODE ANN. § 11-11-3 (1972). The original statute was a compilation of the acts of the Territory. *See* Hutchinson's 1848, ch. 58, art. 1 (19).

[51] MISS. CODE ANN. § 11-11-3 (1972).

[52] *Id.*

[53] *E.g.*, Howard v. Ware, 192 Miss. 36, 42, 3 So. 2d 830, 832 (1941).

[54] See cases cited in notes 32 & 33 *supra*. A different rule, however, applies to in rem actions. *See, e.g.*, Stanley v. Cruise, 134 Miss. 542, 547, 99 So. 376, 377 (1924) (action of

ple, in *Indianola Cotton Oil Co. v. Crowley*,[55] the court held that a defendant accepts the court's venue by appearing and filing a plea to the general issue.[56] Additionally, if there are codefendants, venue is proper where any one of them may be found,[57] provided the action is brought in good faith against the defendant upon whom venue rests.[58]

The importance to defendants of proper venue becomes perhaps most apparent when viewed in conjunction with default judgments. The issue in this context is whether a default judgment granted by a court against a resident defendant in a county other than the defendant's residence is valid if the defendant has not waived venue, has not responded to service of process, and venue is not proper as to any other defendant.[59] Unfortunately, the cases are highly inconsistent on this issue.

Until recently, the Mississippi Supreme Court had consistently held, in a series of cases going back to 1841,[60] that a local court's jurisdiction did not attach to a defendant sued in a county other than where he may be found and thus, a default judgment rendered against him in such a court was void or voidable.[61]

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replevin is an in rem proceeding and venue requirement may not be waived); Lewis v. Sinclair, 126 Miss. 16, 20, 88 So. 401, 401 (1921) (replevin actions—objection to improper venue first made on appeal to circuit court—not waived by failure to assert it earlier). *But cf.* Ravesies v. Martin, 190 Miss. 92, 99, 199 So. 282, 284 (1940) (suit by mortgagee in possession to clear cloud on title is a quasi in rem proceeding and venue objection may be waived). *See generally* F. JAMES & G. HAZARD, *supra* note 11, at 628-29.

[55] 121 Miss. 262, 83 So. 409 (1920) (en banc).

[56] *Id.* at 265, 83 So. at 410.

[57] MISS. CODE ANN. § 11-11-3 (1972); *see, e.g.*, Jeffreys v. Clark, 251 Miss. 129, 139-43, 168 So. 2d 662, 666-67 (1964) (proper venue because of valid claim of negligence against local defendant); New Biloxi Hosp., Inc. v. Frazier, 245 Miss. 185, 192, 146 So. 2d 882, 885 (1962) (proper venue since proper against local defendant at time of filing); Myres v. Vinson, 212 Miss. 85, 89, 54 So. 2d 168, 169 (1951) (may sue in either county when both contain proper defendants); Indianola Cotton Oil Co. v. Crowley, 121 Miss. 262, 265, 83 So. 409, 410 (1920) (en banc) (suit may be filed where one of the defendants is domiciled).

[58] A defendant cannot be joined for the sole purpose of fixing venue; there must be a reasonable claim of liability against him. *See, e.g.*, Jefferson v. Magee, 205 So. 2d 281, 284 (Miss. 1967) (motion for change of venue should have been granted since there was no reasonable claim of liability against the resident defendant); Jeffreys v. Clark, 251 Miss. 129, 139-43, 168 So. 2d 662, 666-67 (1964) (proper venue since claim against resident defendant valid); Crosby v. Robertson, 243 Miss. 420, 426, 137 So. 2d 916, 918 (1962) (change of venue proper where resident defendant was not a "bona fide" defendant); Howard v. Ware, 192 Miss. 36, 42, 3 So. 2d 830, 832 (1941) (en banc) (change of venue should have been allowed since plaintiff did not attempt to establish resident defendant's liability); Trolio v. Nichols, 160 Miss. 611, 617, 133 So. 207, 208 (1931) (venue proper since resident defendant was a "material" defendant).

[59] *See generally* Soper, *supra* note 23, at 132-34.

[60] Bank of Vicksburg v. Jennings, 6 Miss. (5 How.) 425 (1841). Dismissing a default judgment in *Jennings* against a plaintiff who had been served with process outside the county of suit, the court rejected the plaintiff's contention that the objection to venue was not timely, and held that the question presented was one of jurisdiction only. *Id.* at 426.

[61] *E.g.*, Bryant v. Lovitt, 231 Miss. 736, 742, 97 So. 2d 730, 731 (1957) (default judgment void); Perry v. Nolan & Maris, 159 Miss. 384, 387, 131 So. 252, 253 (1930) (default judgment against two nonlocal defendants voidable because service of process on defen-

The Mississippi legislature in 1940 passed a statute providing that any action brought in a court of competent subject matter jurisdiction may not be dismissed for lack of proper venue but shall, on objection by the defendant, be transferred to the county of proper venue.[62] While this statute seems clearly to indicate that default judgments may no longer be dismissed or held void on grounds of improper venue, the two major cases decided on this issue since passage of the act yield directly opposite results—one following, and the other refusing to follow the statute. In *Bryant v. Lovitt,*[63] the first major case decided after the statute's passage, the court relied upon cases decided prior to the enactment of the statute in holding that a default judgment granted against a defendant by a court lacking proper venue is void[64] since the defendant has a right[65] to be sued in the county of his residence.[66] Curiously, the new venue statute was not even mentioned by the court. In *Wofford v. Cities Service Oil Co.,*[67] however, the court broke with precedent[68] by holding that default judgments rendered by a court without proper venue are not automatically void or voidable.[69] The court stated that under the new venue statute,[70] when a defendant has been sued outside the county of his residence, his only remedy to avoid

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dant in county of suit was defective); Campbell v. Triplett, 74 Miss. 365, 367, 20 So. 844, 844 (1896) (default judgment in attachment suit where neither property nor defendant were found in county of suit was void for lack of jurisdiction); Andrews v. Powell, 41 Miss. 729, 736 (1868) (default judgment against defendant in a county other than where defendant was served with process held void); Wolley v. Bowie, 41 Miss. 553, 554 (1867) (default judgment void where suit was instituted in county where one of the defendants could be found but that defendant was then dismissed from the suit).

[62] Miss. Laws ch. 233 (1940) (current version at MISS. CODE ANN. § 11-11-17 (1972)).

[63] 231 Miss. 736, 97 So. 2d 730 (1957).

[64] *Id.* at 745-46, 97 So. 2d at 733. The court gave two reasons for holding the default judgment void in *Bryant.* First, since judgment was by default, no jury was empaneled to try the issues, and second, since the judgment was void because of defective process, it could be attacked at any time. *Id.* at 742, 97 So. 2d at 731-32.

[65] The Mississippi Supreme Court has traditionally characterized venue as a right rather than a mere personal privilege. See cases cited in note 31 *supra.*

[66] 231 Miss. at 740, 97 So. 2d at 731. The court reasoned that to hold otherwise would create undue hardships for the defendant:

> Permission to plaintiffs to select the situs of personal actions, not local, would often work great hardship and disadvantage to defendants. Conceivably the suit might be filed in this state three hundred miles from the county of the residence of such a defendant, necessitating large outlay of money for travel and other expenses, to defend the suit with resulting inability of such defendant to procure attendance of witnesses at the trial.

Id. at 742, 97 So. 2d at 731.

[67] 236 So. 2d 743 (Miss. 1970).

[68] See note 61 and accompanying text *supra. But see* Catlett v. Drummond, 113 Miss. 450, 456, 74 So. 323, 324 (1917) (default judgment held valid notwithstanding improper venue); Cain v. Simpson, 53 Miss. 521, 524 (1876) (failure to apply for transfer waived attack on ground of improper venue); Christian v. O'Neal, 46 Miss. 669, 675 (1872) (same).

[69] 236 So. 2d at 745-46.

[70] MISS. CODE ANN. § 1441 (1942) (current version at MISS. CODE ANN. § 11-11-17 (1972)).

suffering default is to make a "timely objection"[71] to improper venue and have the case removed to the county of proper venue.[72] In reaching its conclusion, the court failed to mention any of the prior cases dealing with default judgments and based its decision instead on two cases dealing with judgments on the merits.[73] It has been suggested that the logical effect of this decision is to render service of process valid throughout the state since under *Wofford* the territorial jurisdiction of the court is not affected by service of process in a county other than the county of suit.[74] Thus, until the decision in the instant case, plaintiffs could conceivably have filed suit indiscriminately in any county and, to avoid suffering default, the defendant would have had to apply for a transfer of the case to the county of proper venue.[75]

In the instant case the court reasoned that since *Bryant v. Lovitt*[76] had involved an issue of whether the defendant had actually been served with process,[77] and since the plaintiff in *Wofford v. Cities Service Oil Co.*[78] had made a good faith effort to bring suit in the county where one of the defendants could be found,[79] neither case was apposite[80] and disposition of the instant case therefore depended on an interpretation of the applicable venue statutes.[81] While both statutes provide for a remedy of removal to the county of proper venue when an action has been brought in a county of improper venue,[82] that remedy must be viewed, the court concluded, in light of the overall legislative purpose of the statutes.[83] Since the statutes are designed to establish the venue of a civil action in the county where a defendant may be found,[84] the statutory removal remedy need not be exercised by the defendant to avoid a default judgment, according to the court, in the absence of a bona fide and reasonable effort by

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[71] The meaning of the phrase "timely objection" is another confusing point in dealing with venue. Some reference has been made to this problem in previous Mississippi cases. *See* Leake County Coop. (AAL) v. Dependents of Barrett, 226 So. 2d 608, 616 (Miss. 1969) (must be a seasonable objection); Ainsworth v. Blakeney, 232 Miss. 297, 306, 98 So. 2d 880, 884 (1957) (must be a "timely" objection). Mississippi is not alone in this confusion, however, since only a minority of states have specifically defined what timely objection means. *See* Stevens, *supra* note 11, at 322.

[72] 236 So. 2d at 746.

[73] The two cases on which the court relied in *Wofford* involved actions of replevin, and in both, the defendants had participated in the proceedings before requesting a change of venue. *See* Ainsworth v. Blakeney, 232 Miss. 297, 306, 98 So. 2d 880, 884 (1957) (venue waived in absence of timely objection); King v. Ainsworth, 225 Miss. 248, 250, 83 So. 2d 97, 98 (1955) (defendant submitted to jurisdiction by participating), *cited in* Wofford v. Cities Service Oil Co., 236 So. 2d 743, 745 (Miss. 1970).

[74] Soper, *supra* note 23, at 139.

[75] *See id.*

[76] 231 Miss. 736, 97 So. 2d 730 (1957).

[77] Gillard v. Great S. Mortgage & Loan Corp., 354 So. 2d 794, 795 (Miss. 1978).

[78] 236 So. 2d 743 (Miss. 1970).

[79] 354 So. 2d at 796.

[80] *Id.* at 795-96.

[81] *Id.* at 797.

[82] MISS. CODE ANN. §§ 11-11-3, -17 (1972).

[83] 354 So. 2d at 797.

[84] *Id.*

the plaintiff to bring the suit in a county where a defendant may be found.[85] The court reasoned that to allow a plaintiff to file suit in the county of his choice and thereby force the defendant to exercise his statutory removal remedy or suffer default would result in impermissible "forum shopping" and would contravene the legislative intent of the venue statutes.[86] The court held that because the plaintiff in the instant case had made no effort to file suit where any of the defendants could have been found,[87] the judgment of the circuit court must be reversed and the judgment of the county court dismissing the default judgment reinstated.[88]

In a dissenting opinion, Justice Sugg echoed the majority's concern over allowing the practice of plaintiffs' forum shopping, but disagreed with the majority's methods of prevention.[89] He argued that since the venue statutes[90] clearly provide that an action cannot be dismissed for lack of venue but may be transferred on the defendant's objection to the county of proper venue, the majority had incorrectly interpreted the statutes.[91] Therefore, according to Justice Sugg, to avoid judicial legislation, and without attempting to resolve the inconsistencies in the prior cases, the supreme court should act to prevent forum shopping by promulgating a procedural rule forthrightly.[92] Accordingly, the rule should provide that a plaintiff who sues in a county of improper venue must bear the costs of transferring the case to the proper county if the defendant objects to venue.[93] Such a rule would deter plaintiffs from suing in the county of their choice while compensating defendants for the expense and inconvenience of transferring the case to the county of proper venue.[94]

Justice Broom also dissented, stating that while section 11-11-3[95] of the Mississippi Code clearly requires that an action shall be brought in the county where a defendant can be found, section 11-11-17[96] is equally clear in requiring that an action shall not be dismissed for lack of proper venue.[97] He argued that since a general rule of statutory construction is that the most recent statute controls the construction of older statutes, the majority had incorrectly ignored the clear prohibition of dismissal of suits for lack of venue contained in section

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[85] *Id.* at 798.

[86] *Id.* at 798 (quoting Bryant v. Lovitt, 231 Miss. 736, 742, 97 So. 2d 730, 731 (1957)).

[87] 354 So. 2d at 797.

[88] *Id.* at 798.

[89] *Id.* at 798-99 (Sugg, J., dissenting).

[90] MISS. CODE ANN. §§ 11-11-3, -17 (1972).

[91] 354 So. 2d at 798.

[92] Justice Sugg's proposal was based upon the rule announced in Newell v. State, 308 So. 2d 71, 76 (Miss. 1976) ("The inherent power of this Court to promulgate procedural rules emanates from the fundamental constitutional concept of the separation of powers and the vesting of judicial powers in the courts.").

[93] 354 So. 2d at 799 (Sugg, J., dissenting).

[94] *Id.* The cost should include attorneys' fees and compensation not only for the defendant's expense, but also for his inconvenience. *See* Stevens, *supra* note 11, at 336 (discussion of the model venue statute).

[95] MISS. CODE ANN. § 11-11-3 (1972).

[96] *Id.* § 11-11-17.

[97] 354 So. 2d at 799 (Broom, J., dissenting).

11-11-17.[98] Moreover, according to Justice Broom, the necessity of the trial court's determining compliance with the new "bona fide and reasonable effort" requirement will result in unnecessary litigation since the requirement has no logical or precedential basis.[99] Indeed, he argued, the majority's holding encourages defendants to ignore service of process and attempt later to have default judgments set aside on the basis of the plaintiff's failure to comply with the new requirement.[100] Concluding, Justice Broom suggested that, to prevent forum shopping and unnecessary litigation, the court should either promulgate a procedural rule or request that the legislature enact a more appropriate venue statute.[101]

The decision in the instant case further complicates an already confusing situation. The court had an opportunity in *Gillard* to alleviate some of the confusion in Mississippi about the interdependent relationships among venue, jurisdiction, service of process and default judgments.[102] Instead, the court added a heretofore unmentioned[103] factor to the matrix of rules and exceptions that have evolved from the venue statutes. Although the holding in the instant case may in some degree deter the use of forum shopping by plaintiffs,[104] this benefit may be outweighed by the problems that will surely result from the attempted implementation of the "bona fide and reasonable effort" requirement.[105] The court did not, unfortunately, outline in *Gillard* what type factual situation will satisfy the bona fide effort test. At first glance, it seems that this test refers to the type factual situation presented in *Wofford v. Cities Service Oil Co.*,[106] where the plaintiff had attempted to serve the defendant upon whom venue rested with process before taking a default judgment against the other defendants.[107] In *Gillard,* however, the court distinguished *Wofford* on the ground that *Wofford* involved an attempted service of process on the defendant who was a resident of the county of suit.[108] Justice Broom's conclusion that the

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[98] *Id.* at 800. Furthermore, Justice Broom was unable to draw any factual distinction between Wofford v. Cities Service Oil Co., 236 So. 2d 743 (Miss. 1970), and the instant case. 354 So. 2d at 799.

[99] 354 So. 2d at 799.

[100] *Id.*

[101] *Id.*

[102] To decide the case, the court could have chosen either of two lines of reasoning that are grounded in precedent: (1) default judgments obtained in a county of improper venue are voidable, or (2) to avoid suffering default, the defendant must move to transfer the action to a county of proper venue. See notes 64 through 75 and accompanying text *supra.*

[103] The only mention of a good faith effort in prior case law involving venue is the prohibition against joining a defendant for the sole purpose of fixing venue. See cases cited in note 58 *supra.*

[104] *See* Gillard v. Great S. Mortgage & Loan Corp., 354 So. 2d 794, 798 (Miss. 1978) (to permit forum shopping would contravene purpose of venue statutes).

[105] *See id.* at 800 (Broom, J., dissenting) (noting that requirement is "totally lacking in logic" and that its implementation will necessitate test cases).

[106] 236 So. 2d 743 (Miss. 1970).

[107] *Id.* at 744.

[108] 354 So. 2d at 796.

ground upon which *Wofford* was distinguished is "more artificial than real"[109] is appealing since it is difficult to understand how an *attempted* service of process on the defendant upon whom venue rests, regardless of the effort used, can confer jurisdiction upon the court.[110] *Wofford* was decided on the basis that a failure by a defendant to object to venue constitutes a waiver of venue;[111] the fact that there was a good faith effort in *Wofford* to serve process upon the defendant who was a resident of the county of suit was not the basis of the decision,[112] nor is it an adequate distinguishing feature.

The *Gillard* decision becomes even more confusing when viewed in the light of *Bryant v. Lovitt.*[113] In *Bryant*, the court ruled that, under the venue statutes, it is the right of a resident defendant to be sued in the county of his residence.[114] The *Gillard* court distinguished *Bryant* on the ground that in *Bryant* the defendant claimed to have had no personal notice of the suit pending against him outside his home county until writs of garnishment were issued on the judgment, and on the ground that there was an issue concerning whether the defendant's wife had accepted the attempted service of process on him.[115] This distinction seems somewhat contrived, however, since *Bryant* was decided on the ground that no process had issued for the defendant from a court of proper venue.[116] Thus, it seems that under *Bryant,* venue is jurisdictional since territorial jurisdiction does not attach to the defendant by service of process issued from a court of improper venue;[117] under *Wofford,* statewide service of process and jurisdiction are valid, venue is a matter of the location of trial only, and the defendant must object to venue to have the suit removed to his home county;[118] and under *Gillard,* whether statewide service of process and jurisdiction are valid, which in turn determines whether venue is jurisdictional, depends on whether there is a "bona fide and reasonable effort" by the plaintiff to bring suit in a county where the defendant or one of them resides or may be found. Impliedly, whether venue is jurisdictional may be a matter of the intent and good faith of the plaintiff. By failing to clarify what should be a definite distinction between jurisdiction and venue, the court has left this area of the law in a state of flux.

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[109] *Id.* at 800 (Broom, J., dissenting).

[110] This is especially true since the Mississippi Supreme Court has consistently held that process must be served in the county of proper venue before the territorial jurisdiction of the court can attach to the defendant. See notes 40 through 43 and accompanying text *supra.*

[111] *See* Wofford v. Cities Service Oil Co., 236 So. 2d 743, 746 (Miss. 1970) ("We hold that timely objection was not made as specifically required by statute, that venue was thus waived . . . .").

[112] Indeed, "good faith" was never mentioned by the *Wofford* court.

[113] 231 Miss. 736, 97 So. 2d 730 (1957).

[114] *Id.* at 740, 97 So. 2d at 731.

[115] 354 So. 2d at 795.

[116] Bryant v. Lovitt, 231 Miss. 736, 740, 97 So. 2d 730, 731 (1957).

[117] See notes 64 through 66 and accompanying text *supra.*

[118] See notes 67 through 73 and accompanying text *supra.* Although the court in *Wofford* phrased the issue as one of "venue jurisdiction," 236 So. 2d at 745, the court analytically treated venue and jurisdiction as distinct concepts, holding that improper venue did not defeat the court's jurisdiction. *Id.* at 745-46.

The key to resolving this complex issue lies in the interpretations given the words "venue" and "jurisdiction." The jurisdiction of the civil courts of Mississippi should include all controversies over which the courts have subject matter jurisdiction,[119] and service of process should be valid statewide.[120] Service of process should function only to notify the defendant of a lawsuit against him; its validity for purposes of the court's territorial jurisdiction should not be affected by the filing of suit in a county of improper venue.

Accordingly, venue should relate only to the place of trial and should have no bearing upon the validity of service of process or upon the court's territorial jurisdiction.[121] The defendant's right to have an action against him tried in the county of his residence should be recognized, but it should be recognized as a privilege[122] rather than a substantive right[123] which, unless asserted, is deemed to have been waived.[124] If the defendant chooses to ignore the service of process, he chooses also not to defend the lawsuit and his privilege of having the suit tried in the county of his residence should not concern the court. Most importantly, however, when the defendant chooses to contest the suit against him, he should be entitled to remove the action to the county of his residence at the plaintiff's expense.[125] This remedy, suggested by the Proposed Mississippi Rules of Civil Procedure,[126] would have the desirable effects of deterring the practice of forum shopping and minimizing, if not eliminating altogether, any inconveniences a removal might cause the defendant.

Legislation is the preferable method for implementing the foregoing suggestions,[127] for piecemeal judicial rulings can only change the interpretations given to the narrow and confusing language[128] that appears in the present statutes. The legislation should eliminate confusing terminology like "venue jurisdiction," and should provide that, for the filing of actions, the jurisdiction of the civil courts of Mississippi is statewide. Similarly, the legislation should stipulate that venue concerns only the location of the trial, and has no bearing upon the court's jurisdiction or the validity of service of process. In the absence of such legislation, it is our hope that the court will begin to recognize the conceptual distinctions between jurisdiction and venue, and will put an end to the confusion the present case has served only to exacerbate.

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[119] See notes 10, 12 through 18 & 22 and accompanying text *supra.*

[120] See notes 38 through 40 and accompanying text *supra.*

[121] See note 39 and accompanying text *supra.*

[122] See note 31 and accompanying text *supra.*

[123] See note 65 and accompanying text *supra.*

[124] See notes 32 & 33 and accompanying text *supra.*

[125] 354 So. 2d at 799 (Sugg, J., dissenting). *But see id.* at 800 (Broom, J., dissenting) (noting that merely filing a motion to transfer would not involve great inconvenience or expense).

[126] Miss. R. Civ. P., rule 82(D) (May, 1978 draft).

[127] 354 So. 2d at 800-01 (Broom, J., dissenting).

[128] See notes 6, 44 & 46 and accompanying text *supra.*

INTERNAL REVENUE CODE—SECTIONS 6213 AND 7502—CONDUCT OF GOVERNMENT EMPLOYEES WILL NOT DEFEAT AN OTHERWISE TIMELY FILING FOR INCOME TAX REDETERMINATION

Plaintiff[1] petitioned the Tax Court of the United States under section 6213 of the Internal Revenue Code[2] for a redetermination of income tax deficiencies asserted by the Commissioner of Internal Revenue.[3] Plaintiff contended that although his petition was neither mailed[4] from the prison where he was incarcerated nor received by the Tax Court within the statutory period, it was timely filed because the mailing delay was caused by a penitentiary staff member.[5] The Tax Court dismissed, accepting the Commissioner's contention that strict compliance with the filing requirement of section 6213 is mandatory and jurisdictional.[6] On appeal to the United States Court of Appeals for the Fourth Circuit, *held*, reversed. Delay caused by employees of the United States government does not prevent a taxpayer's otherwise timely petition from conferring jurisdiction upon the Tax Court. *Curry v. Commissioner*, 571 F.2d 1306 (4th Cir. 1978).

Although the modern system of income taxation was instituted in the United States in 1913,[7] a filing provision similar to section 6213 of the Internal Revenue Code was not enacted until the passage of the Revenue Act of 1924.[8] Since 1924, various changes have been made in the length and manner of computation of the filing period,[9] but the requirement of "filing" for a redetermination of tax deficiencies has remained constant.[10] Moreover, interpretation of the

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[1] Plaintiff Willie A. Curry was a prisoner at Leavenworth Penitentiary. Curry v. Commissioner, 571 F.2d 1306, 1307 (4th Cir. 1978).

[2] I.R.C. § 6213 provides in relevant part that within 90 days after the notice of deficiency authorized in § 6212 is mailed, the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency.

[3] *Id.* § 6212(a) provides that if the Secretary or his delegate determines that there is a deficiency in respect to tax, he is authorized to send notice of the deficiency to the taxpayer by certified or registered mail. The District Director for the Greensboro, North Carolina office of the Internal Revenue Service mailed a notice of deficiency to Curry on April 14, 1975. Curry v. Commissioner, 571 F.2d 1306, 1307.

[4] 571 F.2d at 1307. I.R.C. § 7502(a) provides that the date of the postmark stamped on the cover in which a petition is mailed shall be deemed to be the date of delivery.

[5] 571 F.2d at 1307. Plaintiff placed his petition for redetermination in the prisoners' mailbox for legal mail on July 8, 1975, six days prior to the 90 day deadline of July 14. A staff member at the prison, mistakenly believing that the petition was incorrectly addressed, returned it to the plaintiff on July 18. The petition was then mailed on July 21, 1975, seven days after the deadline. *Id.*

[6] *Id.*

[7] Revenue Act of 1913, 38 Stat. 114.

[8] Revenue Act of 1924, § 274(a), 43 Stat. 297 (now I.R.C. § 6213(a)). The Board of Tax Appeals, now the Tax Court of the United States, was also created by this Act. Revenue Act of 1924, § 900, 43 Stat. 253, 336.

[9] The original statutory period for filing a petition was 60 days. Revenue Act of 1924, § 274, 43 Stat. 297. In 1934, this period was lengthened to 90 days. Revenue Act of 1934, § 501, 48 Stat. 680 (now I.R.C. § 541).

[10] The 1924 Revenue Act referred to filing of the "appeal." Revenue Act of 1924, § 274(a), 43 Stat. 297. Beginning with the 1926 Revenue Act, Congress changed this term to "petition." Revenue Act of 1926, § 274(a), 44 Stat. 55.

filing requirement as jurisdictional was established as early as 1928.[11] In *Lewis-Hall Iron Works v. Blair*,[12] the District of Columbia Court of Appeals held that the Tax Court lacked jurisdiction to act upon a petition that was delivered to the Tax Court's mail room after business hours on the final day of the statutory period.[13] Construing the provision as requiring literal adherence, the court stated that filing was not complete until the petition was placed in the custody of, and endorsed by, the proper official.[14]

Following *Lewis-Hall*, other courts of appeal held that dismissal of an untimely petition was mandatory[15] even if deviation from the statutory requirement was slight.[16] An exception was created in some decisions, however, when the untimeliness was attributable to tax officials rather than to the taxpayer.[17] For example, when the Commissioner of Internal Revenue was negligent in ascertaining the taxpayer's last known address, the taxpayer was credited with the length of the delay caused by the Commissioner's negligence.[18] Notwithstanding this exception, the requirement of timely filing was still considered jurisdictional, and the Tax Court was deemed powerless to dispense with the statutory filing requirement on equitable grounds.[19] As stated by the Ninth Circuit, to allow equitable exceptions would be to "open the door wide for any and all so-called excusable failures on the part of the taxpayer."[20]

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[11] *E.g.*, Lewis-Hall Iron Works v. Blair, 23 F.2d 972, 974 (D.C. Cir. 1928).

[12] *Id.*

[13] *Id.* at 973-74.

[14] *Id.* at 974.

[15] *See, e.g.*, Jorgensen v. Commissioner, 246 F.2d 536, 537 (9th Cir. 1957) (the Tax Court has no jurisdiction when the postmark is not timely); Di Prospero v. Commissioner, 176 F.2d 76, 77 (9th Cir. 1949) (no jurisdiction because petition arrived after closing hours); Stebbins' Estate v. Helvering, 121 F.2d 892, 893-94 (D.C. Cir. 1941) (no jurisdiction where petition deposited at Tax Court three-quarters of an hour after closing hours on ninetieth day); Chambers v. Lucas, 41 F.2d 299, 300 (D.C. Cir. 1930) (petition filed on sixty-first day is untimely).

[16] *See, e.g.*, Di Prospero v. Commissioner, 176 F.2d 76, 77 (9th Cir. 1949) (petition delivered after closing hours on final day held untimely); Stebbins' Estate v. Helvering, 121 F.2d 892, 893-94 (D.C. Cir. 1941) (petition delivered 45 minutes late held untimely); *cf.* Poyner v. Commissioner, 81 F.2d 521, 522 (5th Cir. 1936) (adverse weather conditions that caused petition to be delayed did not toll running of statutory period).

[17] *See* Arlington Corp. v. Commissioner, 183 F.2d 448, 450-51 (5th Cir. 1950) (Commissioner failed to send notice of deficiency to last known address of taxpayer); McCord v. Commissioner, 123 F.2d 164, 165 (D.C. Cir. 1941) (Board of Tax Appeals' method of doing business caused petition's untimeliness); Dilks v. Blair, 23 F.2d 831, 833 (7th Cir. 1927) (statutory period does not begin to run until notice of deficiency is mailed to correct address).

[18] Arlington Corp. v. Commissioner, 183 F.2d 448, 450-51 (5th Cir. 1950); *cf.* Eppler v. Commissioner, 188 F.2d 95, 98 (7th Cir. 1951) (business address is sufficient for notice of deficiency).

[19] *See* Taylor v. Commissioner, 258 F.2d 89, 93 (2d Cir. 1958) (Tax Court has no jurisdiction to provide equitable relief); Barron v. Commissioner, 93 F.2d 751, 753 (9th Cir. 1937) (Board of Tax Appeals has no equitable power to dispense with statutory requirements).

[20] Barron v. Commissioner, 93 F.2d 751, 754 (9th Cir. 1937). *See also* Commissioner v. Gooch Milling & Elevator Co., 320 U.S. 418, 422 (1943) (noting that the mainspring of

Despite the absence of equitable jurisdiction, a trend beginning in the early 1950s indicated that judicial efforts were made to mitigate the harsh inequities resulting from the requirement of literal adherence to the filing provision.[21] In several decisions, courts developed the legal fiction of the presumption of delivery within due course of mail.[22] According to this theory, if a properly addressed and stamped petition was mailed within time to be delivered to the Tax Court in due course of mail before the statutory period had elapsed, it was presumed to have been timely received.[23] A major case illustrating the presumption of delivery in due course is *Central Paper Co. v. Commissioner.*[24] In *Central Paper,* the taxpayer's petition was mailed on the eighty-sixth day of the ninety-day statutory period, but was not filed with the Tax Court until the ninety-second day.[25] The Sixth Circuit held the petition timely since it was presumed that the Tax Court received the petition in the ordinary course of mail.[26] The court did not base its holding upon equitable principles, however, but reasoned instead that the date of filing was ordinary mail receipt as a matter of law.[27] Accordingly, the holding was not viewed as an equitable exception to the statutory filing requirement.[28]

While other courts of appeal[29] also applied the presumption of delivery to assert jurisdiction over untimely petitions, the presumption was rebuttable.[30] Thus, if the Commissioner proved that the delay in delivery was caused by a contingency not attributable to the Tax Court, such as adverse weather conditions, the presumption did not apply.[31] Because of the limited application of the presumption, one commentator concluded that resort to this legal fiction did not liberalize the strict interpretation of the statutory requirement established by prior decisions.[32]

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the Tax Court's jurisdiction is not equity, but the Internal Revenue Code, and that the court has no power to act beyond the scope of the statutory provisions).

[21] See notes 22 through 29 and accompanying text *infra.*

[22] Central Paper Co. v. Commissioner, 199 F.2d 902, 904 (6th Cir. 1952). *See, e.g.,* Detroit Automotive Prod. Corp. v. Commissioner, 203 F.2d 785, 785 (6th Cir. 1953) (invoked presumption of delivery in due course of mail); Arkansas Motor Coaches, Ltd. v. Commissioner, 198 F.2d 189, 191 (8th Cir. 1952) (same).

[23] Wells Marine, Inc. v. Renegotiation Bd., 54 T.C. 1189, 1192 (1970).

[24] 199 F.2d 902 (6th Cir. 1952).

[25] *Id.* at 903.

[26] *Id.* at 904.

[27] *Id.*

[28] *Id.*

[29] See cases cited in note 22 *supra.*

[30] *See* Central Paper Co. v. Commissioner, 199 F.2d 902, 904 (6th Cir. 1952). In *Central Paper,* the court stated that if the delay had been caused by the Post Office Department rather than the Tax Court, the presumption would have been effectively rebutted and the petition untimely. The Postmaster testified, however, that there were no adverse weather conditions or delays in carriage. *Id.*

[31] *Id.; cf.* Poyner v. Commissioner, 81 F.2d 521, 522 (5th Cir. 1936) (prior to development of the presumption, court held that filing delay caused by adverse weather conditions was not excusable).

[32] *See* 4 SYRACUSE L. REV. 383, 384 (1953).

In *Arkansas Motor Coaches, Ltd. v. Commissioner*,[33] the Eighth Circuit held that delays caused by postal employees, as well as by Tax Court employees, would not defeat an otherwise timely petition.[34] Yet, even this expansion of the *Central Paper* decision[35] was far from satisfactory. Courts were often forced to engage in embarrassing inquiries into the handling of the mails by postal employees and into the performance of the Tax Court's own employees.[36] Moreover, many taxpayers lost the right to contest the determination of their tax liabilities before making payment.[37]

In 1954, judicial efforts to mitigate the unintended hardships associated with section 6213 were supplemented with congressional action when section 7502[38] was added to the Internal Revenue Code. Under this section, a petition mailed to the Tax Court is deemed filed on the date of the postmark stamped on its cover.[39] Strictly construing the provisions of section 7502, early decisions held that a timely postmark was essential.[40] Thus, where prisoners attempted to mail their petitions within the statutory filing period, but timely postmarks were not affixed because of the negligence of penitentiary employees,[41] section 7502 was held inapplicable, and the petitions were dismissed as untimely.[42] Moreover, proof that a petition had in fact been delivered to the post office within the statutory period was not sufficient to establish compliance.[43]

Following the decisions concerning petitions with untimely postmarks, the Tax Court was confronted with the problem of illegible postmarks. In *Skolski v. Commissioner*,[44] the Tax Court allowed a post office examiner to examine an

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[33] 198 F.2d 189 (8th Cir. 1952).

[34] *Id.* at 192.

[35] See note 30 and accompanying text *supra*.

[36] Wells Marine, Inc. v. Renegotiation Bd., 54 T.C. 1189, 1192 (1970).

[37] Hertzog, *Administrative and Procedural Changes in the New Code*, 32 TAXES 855, 864 (1954).

[38] Internal Revenue Act of 1954, ch. 736, 68A Stat. 895 (codified at I.R.C. § 7502). For discussion of the problems that prompted the passage of § 7502, see Weiss, *When Is a Petition "Filed" in the Tax Court?*, 8 TAX L. REV. 473 (1953).

[39] I.R.C. § 7502(a)(1).

[40] *See* Wood v. Commissioner, 338 F.2d 602, 603 (9th Cir. 1964) (petition dismissed where no postmark affixed to the envelope); Boccuto v. Commissioner, 277 F.2d 549, 553 (3d Cir. 1960) (timely certified mail receipt of no significance); Bloch v. Commissioner, 254 F.2d 277, 279 (9th Cir. 1958) (prisoner's petition delayed by caseworker); Jorgensen v. Commissioner, 246 F.2d 536, 537 (9th Cir. 1957) (postmark of the ninety-second day not timely); Rich v. Commissioner, 250 F.2d 170, 173 (5th Cir. 1957) (prisoner's petition delayed by institution); Galvin v. Commissioner, 239 F.2d 166, 166 (2d Cir. 1956) (postmark of the ninety-second day not timely).

[41] In Bloch v. Commissioner, 254 F.2d 277, 277 (9th Cir. 1958), the prisoner gave his petition to his caseworker within the prescribed time. In Rich v. Commissioner, 250 F.2d 170, 172 (5th Cir. 1957), the prisoner gave a properly addressed, stamped petition to the prison official in charge of the mailroom 12 days prior to the expiration of the statutory period.

[42] Bloch v. Commissioner, 254 F.2d 277, 279 (9th Cir. 1958); Rich v. Commissioner, 250 F.2d 170, 174 (5th Cir. 1957).

[43] *See* Wood v. Commissioner, 338 F.2d 602, 603-05 (9th Cir. 1964) (court rejected petitioner's testimony of timely filing).

[44] 351 F.2d 485 (3d Cir. 1965).

illegible postmark on an untimely petition.[45] The examiner's failure to ascertain the date of the postmark resulted in the Tax Court's dismissal of the petition.[46] The Third Circuit reversed, holding that the taxpayer should have been allowed to attempt to prove the mailing date by evidence other than the postmark.[47] The court reasoned that "to hold otherwise would be to narrow the scope of §7502 to a fortuitous application wholly dependent upon the care with which postal employees affixed postmarks and thus unwarrantedly to defeat in part its remedial purposes."[48] In a later case,[49] the testimony of the Postmaster was held to be sufficient proof of the date contained in an illegible postmark.[50] This remedy did not, however, extend to inaccurate postmarks,[51] since a legible postmark created a conclusive statutory presumption that the postmark date was the mailing date.[52]

An untimely petition with no postmark was held not to confer jurisdiction upon the Tax Court in *Rappaport v. Commissioner*.[53] In this 1971 decision, the court emphasized that its holding was consistent with the rule that section 7502 is predicated upon the existence of a postmark,[54] and pointed to registered mail as the statutorily authorized method[55] of avoiding the risk that a petition would not be postmarked.[56] In 1975, the *Rappaport* holding was overruled by the Tax Court in *Sylvan v. Commissioner*.[57] In this case, a petition with no postmark was received by the Tax Court one day late.[58] Liberally interpreting congressional intent,[59] the court held that extrinsic evidence of the actual time of mailing was

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[45] *Id.* at 487.

[46] *Id.* at 486.

[47] Skolski v. Commissioner, 351 F.2d 485, 487-88 (3d Cir. 1965). The taxpayers were allowed to have the postmark examined by an examiner of their own choosing. *Id.* at 488.

[48] *Id.* at 488.

[49] Molosh v. Commissioner, 45 T.C. 320 (1965).

[50] The postmaster testified that the petition could not have reached Washington when it did had it not been timely mailed. *Id.* at 321-22. *But see* Vitale v. Commissioner, 59 T.C. 246, 247 (1972) (proof of date contained in illegible postmark not accepted).

[51] *See* Drake v. Commissioner, 554 F.2d 736, 738 (5th Cir. 1977) (petition mailed on ninetieth day, but postmarked on ninety-first day, deemed untimely); Moffatt v. Commissioner, 46 T.C. 499, 500 (1966) (petition mailed at 9:40 p.m. on ninetieth day; postmark bore date of ninety-first day); Madison v. Commissioner, 28 T.C. 1301, 1302 (1957) (filing date under § 7502 is determined by postmark, not by date when petition was placed in mailbox).

[52] Moffatt v. Commissioner, 46 T.C. 499, 502 (1966).

[53] 55 T.C. 709 (1971), *aff'd*, 456 F.2d 1335 (2d Cir. 1972).

[54] *See* Wood v. Commissioner, 41 T.C. 593, 594 (1964) (untimely petition dismissed where no postmarked stamp bearing a date appeared on the cover), *aff'd*, 338 F.2d 602 (9th Cir. 1964); Madison v. Commissioner, 28 T.C. 1301, 1302 (1957) (no postmark date stamped on cover so petition failed).

[55] I.R.C. § 7502(c)(1) provides that the date of registration of registered mail shall be deemed the postmark date.

[56] Rappaport v. Commissioner, 55 T.C. 709, 711 (1971), *aff'd*, 456 F.2d 1335 (2d Cir. 1972).

[57] 65 T.C. 548 (1975).

[58] *Id.* at 549.

[59] The court reasoned that in substituting the time of mailing for the time of delivery

relevant,[60] and thus further liberalized the interpretation of section 7502.[61]

The history of rule 37 of the Federal Rules of Criminal Procedure[62] is analogous to the history of sections 6213 and 7502 of the Internal Revenue Code. Early interpretations of rule 37, involving appeals that were untimely because of an attorney's neglect, insisted upon strict construction.[63] In *United States v. Isabella*,[64] the Second Circuit reasoned that since rule 37 contained no provision for excusable neglect, dismissal of an untimely appeal was mandatory.[65] The interpretation that timely notice of appeal was jurisdictional was also adopted by the Supreme Court.[66] In *Fallen v. United States*,[67] however, the Court was confronted with a notice of appeal that was mailed by the defendant within the statutory period, but was untimely because of delays in the prison's mail system.[68] Liberalizing its prior position,[69] the Court allowed the defendant's appeal, holding that the rule should not be applied without regard to the circumstances surrounding the delay.[70]

In the instant case, the Fourth Circuit held that since the plaintiff had done everything within his power to file his petition on time,[71] and since the filing delay was caused by government employees,[72] equitable principles required the

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as the filing date, Congress logically chose the postmark date to determine the time of mailing, but probably did not consider what should happen when there is either no postmark or an illegible one. *Id.* at 551-52. There is very little legislative history concerning the enactment of § 7502 other than that it was meant to relieve unintended hardships resulting from the filing provision of § 6213. *See* S. REP. No. 1983, 85th Cong., 2d Sess. 1, *reprinted in* [1958] U. S. CODE CONG. & AD. NEWS 4791, 4791.

[60] 65 T.C. at 552.

[61] *But see* Drake v. Commissioner, 554 F.2d 736, 738 (5th Cir. 1977) (Tax Court deemed untimely a petition mailed on the ninetieth day but not postmarked until the ninety-first day).

[62] FED. R. CRIM. P. 37(a)(2), now FED. R. APP. P. 4(b), provides that notice of appeal from a criminal conviction must be filed within 10 days after entry of the judgment or order.

[63] *See, e.g.*, Berman v. United States, 378 U.S. 530, 530 (1964) (no jurisdiction when defendant's attorney missed the deadline because of illness); United States v. Robinson, 361 U.S. 220, 229-30 (1960) (misunderstanding between counsel and defendant did not excuse untimely appeal); United States v. Isabella, 251 F.2d 223, 226 (2d Cir. 1958) (neither oral notice of appeal nor attorney's neglect excused untimeliness).

[64] 251 F.2d 223 (2d Cir. 1958).

[65] *Id.* at 226.

[66] Berman v. United States, 378 U.S. 530, 530 (1964); United States v. Robinson, 361 U.S. 220, 229-30 (1960).

[67] 378 U.S. 139 (1964).

[68] *Id.* at 143.

[69] *See generally Review of Recent Supreme Court Decisions*, 51 A.B.A.J. 171 (1965) (comparison of *Berman* and *Fallen*).

[70] 378 U.S. at 144.

[71] Curry v. Commissioner, 571 F.2d 1306, 1308 (4th Cir. 1978). Curry's allegation of timely mailing was corroborated by letters from a warden and a senior case manager. *Id.* at 1307.

[72] The court reasoned that it made no difference that the government employees who caused the delay were employed by the Bureau of Prisons rather than by the Internal Revenue Service or the Post Office. *Id.* at 1308.

Tax Court to assume jurisdiction.[73] Rejecting the reasoning of factually indistinguishable cases[74] in which jurisdiction was denied, and relying upon recent Supreme Court decisions[75] that firmly established prisoners' constitutional right of access to the courts, the court refused to allow the government to capitalize on the negligence of its own employees.[76] As an alternative basis for its holding, the court reasoned that since section 7502 has been interpreted as deeming a timely mailed petition to be timely filed,[77] and since it is primarily a remedial statute,[78] it should not be strictly and unreasonably construed to frustrate a taxpayer's option for redetermination.[79] The court concluded that even if section 7502 is the "exclusive means of mitigating the 90 day requirement,"[80] the plaintiff's petition was timely filed since it was in fact timely mailed by Curry.[81]

The court's holding in the instant case not only produced a fair and equitable result for the immediate taxpayer, it also provided further precedent for expanding the Tax Court's equitable powers. Although the Tax Court has repeatedly been held to possess no equitable jurisdiction,[82] for several years the courts have managed to circumvent[83] the inflexible requirements of the Internal Revenue Code when motivated by equitable considerations. Even prior to the passage of section 7502, delay caused by the negligence of tax officials was not allowed to defeat an otherwise timely filed petition.[84] Moreover, the remedial effect of section 7502, once considered wholly dependent upon the existence of a timely postmark,[85] has been gradually extended to protect against mistakes of postal service employees, so that petitions with illegible postmarks[86] and

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[73] *Id.* at 1307.

[74] *Id.* at 1307 n.2; *see* Bloch v. Commissioner, 254 F.2d 277, 278-79 (9th Cir. 1958) (prison official failed to mail petition within 90 day period and petition was therefore held to be untimely filed though it had been delivered to the prison official for mailing within the 90 day period); Rich v. Commissioner, 250 F.2d 170, 172-75 (5th Cir. 1957) (petition which was not mailed within 90 day period through inadvertence of prison mail room employee held to be untimely filed).

[75] 571 F.2d at 1307 n.2. *See generally* Bounds v. Smith, 430 U.S. 817, 821-25 (1977) for a discussion of Supreme Court cases which have established this right of access to the courts.

The court in *Curry* noted that a contrary decision would have presented a constitutional issue under the due process clause of the fifth amendment. 571 F.2d at 1309.

[76] 571 F.2d at 1308.

[77] *Id.* at 1309.

[78] *Id.*

[79] *Id.* at 1308. The court rejected the government's argument that Curry had an option to pay the alleged deficiency and sue for a refund in district court, noting that the option was really illusory since Curry had qualified for court-appointed counsel and presumably could not pay the deficiency. *Id.*

[80] *Id.* at 1309.

[81] The court cautioned that its holding did not mean that an uncorroborated claim of timely mailing would avoid the requirements of § 6213. *Id.* at 1310.

[82] See notes 19 & 20 and accompanying text *supra.*

[83] See notes 17 & 18, 21 through 26, and 33 & 34 and accompanying text *supra.*

[84] See notes 17 & 18 and accompanying text *supra.*

[85] See notes 40 through 43 and accompanying text *supra.*

[86] See notes 44 through 50 and accompanying text *supra.*

petitions with no postmarks[87] do not automatically fail. As the Fourth Circuit noted in the instant case,[88] it is only reasonable to extend such protection to taxpayers who have attempted to file timely petitions and the delay has been caused by other government employees.

Conversely, by allowing compliance through actions other than those specified in section 7502, the court seems to have acted in a legislative capacity,[89] and the instant decision may frustrate the determination of whether a petition has been timely filed. Since under *Curry*, the Tax Court's discretion, rather than statutory guidance, would be determinative in cases involving equitable considerations, interpretations of the Internal Revenue Code could become less clear and less predictable. But although clarity may be sacrificed, perhaps justice will be more readily attained by allowing the court a freer hand in examining the circumstances and equities. At least in cases within the appellate jurisdiction of the Fourth Circuit,[90] the holding will force the Tax Court to allow the taxpayer to produce evidence concerning the date he attempted to mail his petition if the untimeliness is alleged to be attributable to the conduct of government employees.

Although in the instant case the court undoubtedly was influenced by the underlying constitutional aspect of prisoners' access to the courts,[91] the decision is focused upon an even broader principle—that the government should never be allowed to take advantage of individual citizens by its own negligence. *Curry* makes this principle applicable to all government employees and to all taxpayers within the jurisdiction of the Fourth Circuit. Perhaps other circuits will follow *Curry* and continue the trend of expanding the Tax Court's equitable powers, or perhaps the Tax Court will be overtly granted equitable discretion to alleviate the harsh inequities of strictly interpreting the Internal Revenue Code.

Anna Furr

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[87] See notes 53 through 61 and accompanying text *supra*.

[88] Curry v. Commissioner, 571 F.2d 1306, 1308 (4th Cir. 1978).

[89] *See id.* at 1310 (Hall, J., dissenting) ("[I]t is not the province of this court to 'help out' Congress by making exceptions. . . . We are plainly in legislative territory.").

[90] The Tax Court is bound by principles of law established by a circuit court of appeals when its action is within the appellate jurisdiction of that court. *See, e.g.*, Stacey Mfg. Co. v. Commissioner, 237 F.2d 605, 606 (6th Cir. 1956) (if the Tax Court were not bound on questions of law by decisions of the appropriate appellate court, there would be no purpose in allowing review of the Tax Court's decisions); Houston Farm Dev. Co. v. Commissioner, 194 F.2d 520, 520 (5th Cir. 1952) (Tax Court cannot disregard a decision of the court of appeals in a prior case indistinguishable on its controlling facts). This appellate structure sometimes creates uncertainty and a lack of uniformity in Tax Court decisions. *See generally* 4 WAYNE L. REV. 179, 180-82 (1958) (discusses need for one Tax Court of Appeals).

[91] *See* Curry v. Commissioner, 571 F.2d 1306, 1307 n.2, 1309 (4th Cir. 1978).

BOOK REVIEWS

Handling Misdemeanor Cases

By: F. Lee Bailey and Henry L. Rothblatt
Rochester, N.Y.: The Lawyers Co-Operative Publishing Company, 1977
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*Harvey H. Chamberlin**

In theory, the American system of criminal justice has much to recommend it. Guilt or innocence is to be determined through an open, adjudicative process in which witnesses confront the accused and the state bears the burden of proving that the defendant is guilty of the crime for which he has been charged. The accused may present evidence, although he need not testify in his own behalf. The defendant has the assistance of counsel, and a judge impartially applies rules of law and protects the rights of the defendant. Upon conviction, the defendant has a right to appellate review which will correct errors and assure that the rules of law have been followed.

The actual operation of the criminal "justice" system, however, as every experienced criminal lawyer knows, presents an altogether different face. A semblance of the theory exists in felony cases, but becomes more elusive as the possible penalties grow less severe. In lower criminal courts, known in various states as municipal, justice, district, magistrate, police, city and justice of the peace courts, one finds a proceeding that bears little resemblance to the theory. To borrow the characterizations of Professor Packer's "Two Models of the Criminal Process,"[1] misdemeanor courts tend to lean very heavily toward the Crime Control Model and away from the Due Process Model. As the United States Supreme Court noted in *Colten v. Kentucky*:[2] "[T]he inferior courts are not designed or equipped to conduct error-free trials, or to insure full recognition of Constitutional freedoms. They are courts of convenience, to provide speedy and inexpensive means of disposition of charges of minor offenses."[3]

Misdemeanor courts are less accountable to legal authority than are felony courts (known in various states as superior, district, and circuit courts). For example, the trial de novo system, which provides a dissatisfied defendant with a new trial in a court of general jurisdiction, rather than appellate review of the propriety of a judicial ruling, effectively shields misdemeanor courts from appellate scrutiny. Although extraordinary remedies may exist, for example, by writ of habeas corpus, and appellate courts—if pushed—occasionally do intervene, on the whole, misdemeanor courts remain untouched. The absence of easily available procedural remedies for the abuses that do occur contributes to the steward-like role of the lawyer in misdemeanor court proceedings. Similarly, the

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[1] H. Packer, The Limits of the Criminal Sanction, Ch. 8 (1968).

[2] 407 U.S. 104 (1972).

[3] *Id.* at 117.

United States Supreme Court has seldom dealt with lower courts, and when it has, the impact has been slight.[4] "For these reasons, lower courts are visible institutions that, for purposes of supervision and evaluation, function invisibly."[5]

In such a setting, judicial style tends to emphasize outcome over process, leaving the judge to draw on extralegal criteria in his determination. Thus, the actual decision-making process of misdemeanor courts only faintly resembles the formally prescribed adversary procedures which govern our criminal courts. Most cases are handled by well-developed routines. Guilty pleas predominate and the trials which do occur move swiftly, often with the presumption of innocence and burden of proof, for all practical purposes, inverted. The right to counsel is sometimes slighted, or presented as a liability, as for example when an indigent defendant is told during his first court appearance that if he pleads guilty the case will be "taken care of" that very day. Defendants may, as a result of persuasion or misinformation, waive other rights, particularly the right to a jury trial. Contributing to this atmosphere of crude justice is a pervasive sense that the defendant, once caught up in this legal assembly line, has lost all claim to be treated individually. The most dominant value in the misdemeanor system is the expeditious handling of cases. A misdemeanor court's effectiveness is often measured in terms of its "production." Cases must be handled swiftly to clear the way for more cases. Increasing case loads add to pressures for haste and contribute to characteristically cavalier attitudes toward the rights of the defendant and the considered adjudication of factual issues. The apprisal of rights is often en masse. Unstated rules of thumb are used to decide bail, guilt, and sentence. Legal arguments which prolong the proceedings are discouraged; written motions and briefs become the exception rather than the rule, and the frowned-upon exception at that. Defendants asserting rights are sometimes perceived as threats, and deviations from the court routine are quickly sanctioned.

Many misdemeanor judges rely on the administrative-bureaucratic approach to the handling of criminal cases: factual issues are resolved by routine acceptance of the accounts of certain witnesses, such as the police, and cases are fitted into a limited number of categories tied to specific dispositions. In short, misdemeanor courts often provide the closest thing in real life to Professor Packer's pure Crime Control Model for the criminal process. Due process values tend to be disfavored in misdemeanor courts. Due process obstructs factual determinations, and frequently will not help the judge deal with the cases of pain, misery, and human deterioration which he must daily face. A Boston judge, noted for his antipathy to the United States Supreme Court, reveals an all too common attitude among lower court judges:

> Take those two bitches screaming at each other! What's the Supreme Court got to do with them? Or the drunks; it's a farce that I have to ask every one of them if he wants a lawyer . . . . The trouble with the

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[4] *See* Shadwick v. City of Tampa, 407 U.S. 345 (1972); Colten v. Kentucky, 407 U.S. 104 (1972); Ward v. City of Monroeville, 407 U.S. 57 (1972). The exception is, of course, Argersinger v. Hamlin, 407 U.S. 25 (1972).

[5] J. ROBERTSON, ROUGH JUSTICE: PERSPECTIVES ON LOWER CRIMINAL COURTS at xix (1974).

> Court is that it ignores the reality of what day-to-day criminal courts are like. . . . The Court just doesn't know what goes on in a place like this. And you reformers are even worse. They have a priori concepts about poor people and black people and believe that they can be changed in their attitudes and habits. That's just unrealistic.[6]

The purpose of the preceding paragraph is not only to essay the ills of misdemeanor courts but to apprise the reader that there are differences in the practice of criminal law before felony courts and misdemeanor courts—differences which, in the authors' judgment, make misdemeanor practice more difficult than felony practice. Accordingly, Messrs. Bailey and Rothblatt open their large volume with these comments: "There has been a marked paucity of writing in the area of misdemeanor crimes. There is a great need for a comprehensive volume, such as this, to give the attorney guidance in handling a misdemeanor case."[7] They continue: "*Defending Misdemeanor Crimes* [*sic*] is designed to acquaint both the experienced criminal trial lawyer and the civil practitioner with the special problems involved in misdemeanor cases."[8] Unfortunately, these grand intentions do not bear fruit in the more than five hundred succeeding pages. The authors content themselves with concise discussions of pretrial and trial considerations[9] generally applicable to all criminal prosecutions without ever focusing attention on those considerations unique to misdemeanor defense.

Considerations of "Practice and Procedure" make up Part I of *Handling Misdemeanor Cases.* Part II consists of nineteen chapters detailing the elements and other legal considerations pertaining to nineteen common misdemeanors: assault, contempt of court, regulation of demonstrations, disorderly conduct, drug offenses, drunk driving, gambling, petty larceny, lewd conduct, liquor violations, nuisance, obscenity, prostitution, public intoxication, radar speeding cases, reckless driving, resisting arrest, the unauthorized practice of medicine, and bad check offenses. It is really only in Part II that *Handling Misdemeanor Cases* specifically discusses any of the considerations particularly relevant to misdemeanor defense. Even in these chapters, however, the discussion relates only to technical, legal considerations such as the elements of various misdemeanor crimes, and not the more important considerations of pretrial and trial strategy and practice.

For example, Chapter 3 discusses plea bargaining and alerts the reader to the basic considerations which should be kept in mind during any plea bargaining situation. However, there is no discussion of the particular plea bargaining strategies relevant to misdemeanor cases. For instance, the primary target of plea bargain strategy in felony cases is the prosecuting attorney. However, ordinarily the primary target of a plea bargaining strategy in misdemeanor cases is the arresting police officer, or in cases initiated by citizen complaint, the com-

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[6] Harris, *In Criminal Court,* THE NEW YORKER 72 (April 14, 1973).

[7] F. BAILEY AND H. ROTHBLATT, HANDLING MISDEMEANOR CASES at iii (1977).

[8] *Id.*

[9] The best discussion of these considerations by Messrs. Bailey and Rothblatt still remains their SUCCESSFUL TECHNIQUES FOR CRIMINAL TRIALS (1971). *See also* F. BAILEY AND H. ROTHBLATT, FUNDAMENTALS OF CRIMINAL ADVOCACY (1974).

plainant.[10] While all crimes are considered offenses against the state (or city or county), misdemeanors do not ordinarily involve sufficient governmental and public interests to foreclose bargaining influence by police officers and complainants. In felonies, prosecuting attorneys tend to feel that they must represent and protect governmental interests and the interests of the public generally, as well as the interests of the victim. Accordingly, the prosecuting attorney and not the arresting police officer or complainant is the primary bargaining agent in felony cases. This is much less so in misdemeanor cases. Here, prosecuting attorneys seem to view themselves as the prosecutorial agents of the police and the victim, and accordingly give more deference to the wishes of the police officer and complainant.

Whereas the strength of the state's case is generally the dominant factor in plea bargaining with the prosecuting attorney, it is decidedly a secondary consideration with the police officer. Usually, the most persuasive appeal to a police officer is that the defendant is a "nice guy" or a "nice kid." If the defendant's attitude at the time of arrest was, in the eyes of the police officer, "good," defense counsel has one leg up with his plea-bargaining strategy. In the main, police officers view themselves as providing a social service.[11] They wish to help people who are "good" and punish those who are "bad." "Goodness" and "badness" are often defined in terms of attitude. If it is possible and necessary, defense counsel should have his client "clean up his act" and begin a rehabilitative program before trial. This is to demonstrate to the police officer that the defendant now has the correct attitude about what he has done. In short, counsel's plea-bargaining strategy with police officers should focus on the rehabilitation of the defendant.

Misdemeanors filed upon the initiative of the injured party will usually involve a theft or some other taking of property. The motive will ordinarily be the recovery of what was lost, not punishment (although that will be a secondary consideration). Accordingly, misdemeanors initiated by the injured party are pregnant for resolution by compromise.[12] Counsel's offer of satisfactory restitution will often be sufficient to induce the injured party to withdraw the complaint. If the offer alone does not produce the desired result, the offer accompanied by a demonstration of the defendant's contrition may. This demonstration may appear in two forms. If the defendant has entered into some kind of probationary program or self-induced penance, for example, community services work, counsel should so inform the injured party and point out that the defendant has learned his lesson and what a detriment it would be to saddle the defendant with a criminal record. A highly successful approach is for the defendant to accompany counsel when counsel visits the injured party. The defendant

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[10] *Handling Misdemeanor Cases* only discusses plea bargaining with the prosecuting attorney.

[11] *See, e.g.*, A. NEIDERHOFFER AND A. BLUMBERG, THE AMBIVALENT FORCE: PERSPECTIVES ON THE POLICE (1973); J. SKOLNICK AND T. GRAY, POLICE IN AMERICA (1975); J. WILSON, VARIETIES OF POLICE BEHAVIOR (1968). *See also* K. DAVIS, POLICE DISCRETION (1975).

[12] The state of Washington, by statute, allows for the dismissal of charges in misdemeanor cases, with the approval of the court, in situations where there has been a satisfactory out-of-court settlement or compromise with the victim. R.C.W. Ch. 10.22. WASH. REV. CODE § 10.22 (1974).

should personally express his regret and ask for a second chance. It is a hard complainant who can withstand that kind of pressure for a compromise when restitution is also being made.

Many citizen-initiated complaints come from businesses. They are the most difficult to bargain with. Businesses are more concerned about recurring losses than a single loss. Thus, the recommended approach for businesses is to couple the offer of restitution with a promise or an agreed order enjoining the defendant from entering the place of business in the future. Even if a compromise cannot be made, counsel is advised to make restitution where possible. The making of restitution provides persuasive argument for a reduction in the charges or some type of probation.

Assault cases which are citizen-initiated can sometimes be compromised with the passage of time, the cooling of tempers, and counsel's soft-spoken reasoning with the victim. If revenge is the victim's motive for the filing of the complaint, an ingratiating apology by the defendant will sometimes induce a compromise. Where deterrence is the motive, counsel's promise to control the defendant (as is done in some domestic relations cases) or an agreed order enjoining the defendant from having any contact with the victim (again, an analogy to domestic relations cases) may induce a compromise.

There are several considerations in the trial of misdemeanor cases that require special strategies different from those employed in the trial of felony cases. For instance, the right to a jury trial will be waived much more frequently in misdemeanors than in felonies. Judges hearing felony cases seldom take the defendant's exercise of his right to a jury trial as a comment upon the judge's fairness. Misdemeanor judges, however, frequently view the defendant's request for a jury trial as a personal insult. Some misdemeanor judges further regard a jury trial as an imposition on the court. They regard a trial by jury as time-consuming and inefficient. If the trial is to take place before such a judge, it may be dangerous to insist upon a jury trial. In such a case, the judge may severely limit the examination of witnesses and may display his displeasure when he sentences the defendant, if convicted. On the other hand, misdemeanor court judges, much more than felony court judges, seem to be unable to discredit the testimony of police officers, even if it is farfetched. A jury, on the other hand, is likely to be more impressed by testimony alleging police misconduct than a judge in a misdemeanor court would be. There is an axis between misdemeanor courts and police officers that is difficult, if not impossible, to break.

Defense counsel may, on occasion, wish to waive a full evidentiary trial. This can be done both in felony as well as misdemeanor cases. However, this practice is ordinarily reserved for the trial of misdemeanors. If there is no real factual dispute, but there are significant legal isues, it may be desirable to stipulate with the prosecuting attorney to submit the issue to the court on a case-stated basis, for example, on an agreed statement of facts or a police report. The misdemeanor court will often appreciate the time and trouble saved and may reflect its appreciation at the time of sentencing. A trial on the record in misdemeanor court gives defense counsel many of the advantages of a guilty plea, without waiving the right to appeal.

These are just some of the special considerations and strategies which a criminal defense attorney should be aware of in the representation of a client charged with a misdemeanor. There are many other strategies and techniques

particularly applicable to misdemeanor cases dealing with jury selection, whether to make an opening statement, the nature of the closing argument, sentencing, and so forth.

Handling Misdemeanor Cases provides a service by alerting us to the specialization required in defending misdemeanor crimes. Although this large volume falls short of providing the kind of instruction necessary to practice more than just adequately in misdemeanor courts, the authors clearly communicate that persons appearing in "inferior" courts deserve better than "inferior" representation. By treating the "inferior" courts as inferior, criminal lawyers have, at least in a subtle way, contributed to many of the ills described in the opening paragraph of this review. Public defender offices ordinarily use misdemeanor courts as the training ground for their attorneys. New lawyers "cut their teeth" on misdemeanors before trying the "big cases"—felonies. This indirect treatment of misdemeanor courts as "inferior" courts and misdemeanors as "minor" crimes contributes to the sagging sense of justice found in most misdemeanor courts. It is time that we of the criminal defense bar recognize that the trial of misdemeanors is just as important as the trial of felonies, and that misdemeanants just as felons deserve thoroughness in preparation and competence in court. It is well to remember Chief Justice Hughes' often-quoted statement on the importance of lower courts:

> A petty tyrant in police court, refusals of a fair hearing in minor civil courts, the impatient disregard of an immigrant's ignorance of our ways and language, will daily reap Bolsheviks who are beyond the reach of your appeals. Here is work for lawyers. The Supreme Court of the United States and the courts of appeals will take care of themselves. Look after the courts of the poor who stand most in need of justice. The security of the Republic will be found in the treatment of the poor and ignorant; in indifference to their misery and helplessness lies disaster.[13]

[13] 42 REP. N.Y. STATE BAR ASSOCIATION 240, 241 (1919).

NEITHER CRUEL NOR UNUSUAL: THE CASE FOR CAPITAL PUNISHMENT

By: Frank Carrington

New Rochelle, N.Y.: Arlington House, 1978
Pp. 223 $8.95

*Tommy W. Rogers**

Opinions on the death penalty range from Ramsey Clark's "[t]here is no justification for the death penalty" and Alan Goldstein's (Maryland ACLU) "[v]ictims don't have rights," to mass murderer Walter Kelbach's "I don't mind people getting hurt because I just like to watch it." Opponents have spent two centuries building their case. Capital punishment receives the continuing opprobrium of liberal reformers and trendy clerics.

Carrington's *Neither Cruel Nor Unusual: The Case for Capital Punishment* is restorative of balance. The author is thoroughly Jeffersonian in his view that punishment and retribution have a role in an orderly and compassionate society and that the constitutional system does allow society to protect itself from "wicked and dissolute men" who "commit violations on the lives, liberties and property of others . . . by inflicting due punishments on those who perpetuate them." Unlike abolitionists, Carrington refuses deftly to sidestep confronting the agonies of the victim of capital felonies and the anguish, insults, and indignities which criminals inflict upon victims and their families.

The author is quite frankly offended that Richard Speck, eliminator of eight, received a scholarship to a state penitentiary where he contentedly watches television. The book recounts horror stories of recidivism by certified rehabilitees because the author feels they are necessary for defining the realities of parole. The author agrees with Professor Ernest van den Haag that "given the uncertainties of deterrence, we should resolve the question in favor of the potential victim rather than the convicted murderer."

Neither Cruel Nor Unusual: The Case for Capital Punishment is an issue raising and defining book, not a harangue. The author lines up and examines the legal, moral, and practical pro and con arguments. He recognizes the consummate skill with which proponents of victimization—capital punishment abolitionists—won the battle of *Furman v. Georgia* and traces the public counterattack through the avenues of public opinion, legislation, and judicial test. Carrington draws on scholarship, reason, morality, and law to build an affirmative case for capital punishment as a legitimate and necessary antidote to crime. *Neither Cruel Nor Unusual: The Case for Capital Punishment* is a recognition and defense of the sacredness of human life.

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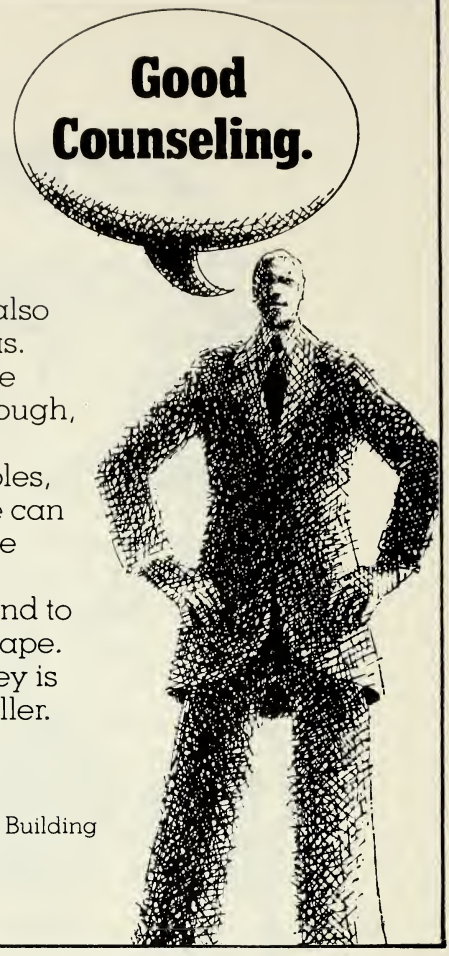

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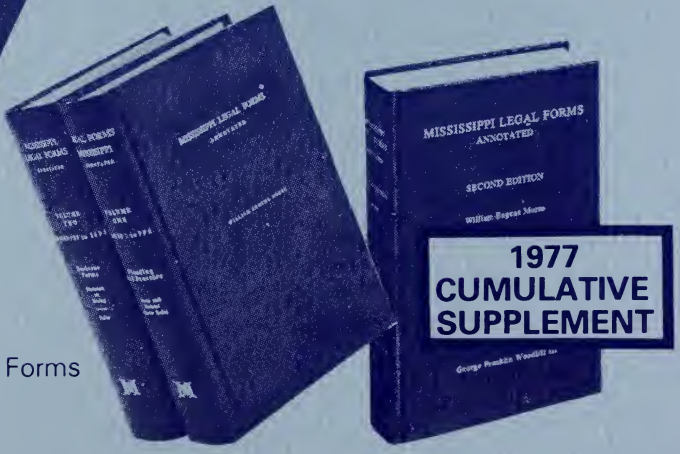

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